

International Litigation

EDITED BY BARTON LEGUM*

I. Parallel Proceedings: Treading Carefully

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The basic principle is that each jurisdiction is independent. There is therefore . . . no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons: a stay (or dismissal) of proceedings and an antisuit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible.¹

Parallel proceedings in more than one country is an increasing problem in international litigation resulting from a myriad of causes, including concurrent jurisdiction and the differences in procedural systems that encourage forum shopping.² There are three possible responses to parallel proceedings: (1) stay or dismiss the domestic action; (2) enjoin the parties from proceeding in the foreign forum (referred to as an antisuit injunction); or (3) allow both suits to proceed simultaneously, with the likely attendant race to judgment. The proliferation of multiple proceedings has led to a variety of approaches, especially in U.S. courts, which reflect the doctrinal inconsistencies in analyzing multiple proceedings, often with tools developed for purely domestic use, such as abstention.³ These divergent methods highlight the need for a uniform treatment of parallel proceedings in domestic and foreign forums. This year's decisions reflect an increasing acknowledgment of the role of comity, even in purely private commercial matters, but also an increasing acceptance at the lower court level of the availability of antisuit injunctions.

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1. *Airbus Industrie GIE v. Patel*, [1998] 2 All ER 257, [1998] 2 WLR 686 (H.L.).

2. See generally LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 233-50 (1996).

3. See *infra* note 31 and accompanying text.

A. TO STAY OR NOT TO STAY

During 1998, the lower courts continued to struggle with whether to stay or dismiss domestic litigation in favor of parallel foreign proceedings, again relying on inconsistent legal theories.⁴ District courts continued to rely myopically on wholly domestic abstention doctrine as support for staying or dismissing cases in U.S. courts in deference to pending foreign actions.⁵ In a typical case, *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*,⁶ a district court in the Seventh Circuit stayed⁷ later-filed U.S. litigation pending completion of earlier-filed litigation in St. Lucia, relying explicitly and exclusively on the *Colorado River*⁸ abstention doctrine. The suit arose from a helicopter lease agreement providing that Ryan Helicopters could purchase the helicopters for a set amount at the end of the lease from Rotocraft Partnerships, Ltd. The original agreement had both Illinois choice of forum and law clauses. A later supplemental agreement designated either Illinois or St. Lucia for both forum and choice of law. Rotocraft assigned its interest in the lease to Finova. Subsequently, Ryan tendered to Rotocraft the remaining lease payments and the required lump sum payment for purchase, which Rotocraft refused. Ryan filed suit in St. Lucia, where the helicopters were located, for breach of contract against Rotocraft. Finova subsequently intervened in the St. Lucia litigation. Four months after the St. Lucia action was filed, Finova filed an action against Ryan in the Northern District of Illinois Federal Court seeking a declaration that it was the sole owner of the helicopters.

While acknowledging that parallel litigation should ordinarily proceed simultaneously,⁹ the district court determined that "exceptional circumstances" provided a basis for abstention. The court took the *Colorado River* doctrine in whole and transported it into federal/foreign litigation, while even quoting the purely domestic state/federal factors, such as "the relative progress of the state and federal proceedings."¹⁰

Although the court dutifully reviewed the *Colorado River* factors, it applied a hybrid that also included forum non conveniens analysis. Thus the court says: "Further, as Finova concedes, this case involves a contract dispute that will likely be resolved under Illinois law and does not involve any federal questions. Thus, there is no strong federal interest that this case be adjudicated

4. See Louise Ellen Teitz, *International Litigation, I. Parallel Proceedings: Treading Carefully*, 32 INT'L LAW. 223 (1998).

5. The inappropriateness of relying on domestic abstention doctrines, even the more closely aligned one, *Colorado River* abstention or "wise judicial administration," is mentioned also in *Evergreen Marine Corp. v. Welgrow International Inc.*, 954 F. Supp. 101, 104 (S.D.N.Y. 1997). While *Colorado River* and its progeny may be instructive in the present context, the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play. *Id.* at 104. See generally Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21 (1992).

6. *Finova Capital Corp. v. Ryan Helicopters U.S.A.*, No. 98C 0761, 1998 U.S. Dist. LEXIS 15874, at *1 (N.D. Ill. 1998).

7. Defendants sought to have the U.S. suit dismissed because it was duplicative, or in the alternative, to stay the U.S. litigation. Unlike many parallel litigation cases, defendants did not argue in the alternative for a dismissal on the basis of forum non conveniens.

8. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976). See also Teitz, *supra* note 4, at 238-40. See generally Linda Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L. J. 99 (1986).

9. "[P]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (footnote omitted). See *Scheiner v. Wallace*, 832 F. Supp. 687, 693 (S.D.N.Y. 1993), dismissed, *sanctions disallowed*, 860 F. Supp. 991 (S.D.N.Y. 1994) ("general rule of comity requires domestic court to exercise jurisdiction concurrently with foreign court").

10. *Finova*, 1998 U.S. Dist. LEXIS 15874, at *9.

in federal court."¹¹ This last statement suggests that federal courts have a basis to abstain in any diversity-based (as opposed to federal question) litigation involving foreign parties since there would be no "strong federal interest." The court identified no "exceptional circumstances" justifying abstention other than the "judicial economy" to be achieved by avoiding "duplicative and wasteful litigation." Nor did the court give much weight to the multiple choice of forum and law clauses suggesting the possibility that the parties considered concurrent actions. "We will not allow a private agreement permitting duplicative and wasteful litigation to extinguish our ability to stay such an action."¹² In the end, the court never really came to terms with the competing doctrines: the *Laker* directive of parallel proceedings and the *Colorado River* abstention for judicial economy.

B. ANTISUIT INJUNCTIONS IN 1998

When considering the reverse-image issue of whether to grant an antisuit injunction, the lower courts seem to have had less difficulty, perhaps because the precedent, although divided,¹³ is more settled than that dealing with staying, abstaining, and/or dismissing. Thus, in one recent case¹⁴ involving parallel proceedings in France and Quebec, the court had no difficulty denying an antisuit injunction and deciding that the Third Circuit had determined that "[i]n sum, duplication of issues and harassment do not justify interfering with an in personam action in a foreign court."¹⁵

Similarly, a New York federal court also had no difficulty deciding to deny an antisuit injunction, relying on the relatively clear Second Circuit precedent established in *China Trade & Development v. M/V Choong Yong*.¹⁶ In *Hamilton Bank, N.A. v. Kookmin Bank*,¹⁷ a Korean bank sued Hamilton Bank in Korea for failure to pay on a letter of credit issued in favor of a Korean exporting firm. The Korean suit was filed in December 1997; the reverse-image declaratory judgment¹⁸ and antisuit injunction action was filed by Hamilton Bank three and a half months later in federal court. The gist of Hamilton's argument for an antisuit injunction enjoining Kookmin from continuing to prosecute its Korean suit was that "the Korean action is designed to evade U.S. principles of personal jurisdiction protected by the Due Process clause" and would "frustrate the Constitutional requirements of minimum contacts and personal jurisdiction."¹⁹ The district court, perhaps too patiently and elaborately, rejected Hamilton's arguments based on U.S. public policy, before eventually getting to the crux that Hamilton could default and contest jurisdiction of the Korean court collaterally in the United States when Kookmin sought to enforce any judgment—a lesson that every first-year law student learns in civil procedure. Hamilton admitted that its only assets to satisfy any Korean judgment Kookmin might obtain were in the United States.²⁰ In effect, Hamilton attempted to challenge personal

11. *Id.* at *10.

12. *Id.* at *13.

13. See H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610.

14. *Armstrong World Indus. v. Sommer Allibert, S.A.*, No. Civ. 97-3914, 1998 WL 195938 (E.D. Pa. 1998).

15. *Id.* at *1 (discussing controlling decision of *Compagnie des Bauxites de Guinée v. Insurance Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981)).

16. *China Trade & Development v. M/V Choony Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

17. *Hamilton Bank, N.A. v. Kookmin Bank*, 999 F. Supp. 586 (S.D.N.Y. 1998).

18. Hamilton Bank's suit also included a claim for libel.

19. *Hamilton Bank*, 999 F. Supp. at 588.

20. See *id.* at 590 n.16.

jurisdiction in foreign litigation in advance of any recognition-and-enforcement action, using the defense of due process offensively to thwart earlier-commenced in personam proceedings. Why the district court felt constrained to give such a detailed discussion, including suggesting that "Korea's concept of personal jurisdiction is not at substantial variance with our own,"²¹ is unclear given Hamilton's failure to raise any significant arguments under *China Trade* or the *American Home Assurance Corp.*²² factors. The court, dignifying Hamilton's argument with a serious review, potentially provides the basis for parties to seek antisuit injunctions to stop any foreign litigation that might not be consistent with U.S. definitions of personal jurisdiction. In addition, the court's inclusion in its analysis of political factors is disconcerting. The court suggests that it "declines to enjoin the prosecution of an ordinary civil action in the courts of a friendly nation and major trading partner"²³—neither of which are necessarily factors that have been recognized in other antisuit actions and both of which impart aspects of foreign-relations law that are arguably not properly the province of the judicial branch. However, these factors can be read narrowly to reflect an awareness of the need for comity when considering interfering with proceedings in a foreign court.

C. EXPANDING THE SCOPE OF ANTISUIT INJUNCTIONS

Although some courts had assumed that antisuit injunctions could be issued in admiralty actions, the Second Circuit explicitly recognized the authority of an admiralty court to issue antisuit²⁴ injunctions in *Farrell Lines Inc. v. Ceres Terminals Inc.*,²⁵ and affirmed the action of the lower court. Farrell Lines issued a bill of lading in connection with transporting a printing press from Italy to Virginia, which bill of lading provided that it was subject to the provisions of the Carriage of Goods by Sea Act (COGSA),²⁶ including the \$500 liability limit. The bill of lading also contained a U.S. choice of law clause and a choice of forum clause for the federal district court for the Southern District of New York. During the unloading in Virginia, the press was damaged in the amount of approximately \$800,000. Farrell filed suit in July 1996 for declaratory and injunctive relief limiting its liability for damage to the cargo to \$500 and declaring that any suit must be brought in New York federal court. The subrogated insurers of the cargo filed suit in Italy six weeks later, seeking recovery for the damage to the cargo. Farrell also sought an antisuit injunction prohibiting the defendant insurers from continuing with litigation elsewhere, in particular in Italy. The defendants moved to dismiss in the federal court on several grounds, or in the alternative, to stay the New York action in favor of the Italian suit.

21. *Id.* at 590.

22. *American Home Assurance Corp. v. Insurance Corp. of Ir.*, 603 F. Supp. 636, 643 (S.D.N.Y. 1984). See also *China Trade Dev. Corp. v. M/V Choong Yong*, 837 F.2d 33 (2d Cir. 1987) ([F]ive factors are suggested in determining whether the foreign action should be enjoined: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issue in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.). In *Nagoya Venture Ltd. v. Bacopulos*, 96 Civ. 9317 (DLC), 1998 U.S. Dist. LEXIS 8580 (S.D.N.Y. 1998), another New York federal court granted an antisuit injunction in connection with two legal actions pending in Canada. The court recognized the five-factor *American Home Assurance* test, but admitted that it was not "specifically examining each factor."

23. *Hamilton Bank*, 999 F. Supp. at 590-591.

24. *Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115, 117 (2d Cir. 1998) (The Second Circuit also referred to this as an "anti-foreign suit injunction").

25. *Farrell Lines, Inc. v. Ceres Terminals, Inc.*, 1997 WL 570494 (S.D.N.Y. 1997) *aff'd*, 161 F.3d 115 (2d Cir. 1998).

26. 46 U.S.C. app. § 1300 et seq.

The district court enforced the forum selection clause and the COGSA limitation, and issued the antisuit injunction, relying on the *Cibina Trade* precedent and the five factors from *American Home Assurance Corp.*²⁷ In issuing the injunction, the district court determined that the parallel Italian litigation frustrated policies of the U.S. forum: (1) U.S. policy favoring enforcement of forum selection clauses, and (2) COGSA limitation of liability provisions in the bill of lading. The defendants admitted that under Italian law Italian courts would not enforce either policy. From this admission, the district court interpreted the filing of the parallel suit as deliberate evasion of U.S. policy and therefore enjoined the defendants from continuing in the Italian forum. But the court could only point to one other court that "previously enjoined a foreign suit where that suit was filed in violation of a forum selection clause."²⁸ Finally, the district court decided that it could apply a more lenient standard to the antisuit injunction since it was also deciding the merits of the plaintiff's claim (which was basically a restatement of the two policies allegedly defeated by the filing of the Italian action.) Thus, this court would suggest that any time one files a suit in a federal court in contravention of a forum selection clause, an antisuit injunction should issue based on the frustration of the policy of enforcing forum selection clauses—or what appears to amount to a bootstrapping argument that allows an antisuit injunction to issue to stop any challenge in a foreign forum to the enforceability of a forum selection clause. Although the district court relied on *Carnival Cruise Lines*²⁹ and *The Bremen v. Zapata*,³⁰ both admiralty cases, for the policy of enforcing forum selection clauses, neither of those cases, nor *Farrell*, appears to limit the willingness to issue an antisuit injunction to enforce a disputed forum selection clause to admiralty cases.

D. COMITY GAINS GROUND ABROAD

The importance of comity in the face of multiple proceedings was recognized by the House of Lords when it set aside an earlier-granted antisuit injunction in *Airbus Industrie GIE v. Patel*,³¹ a case which involved litigation in Bangalore, India and in Texas state and federal court as well. Unlike earlier antisuit injunction cases where England was one of the potential forums, *Airbus* considered the availability of antisuit injunctions in a case where England was not the natural forum, but rather was selecting between other alternative forums, Texas and India, but the parties sought to be restrained were within the jurisdiction of the English courts. The defendants' counsel described the English courts as acting as an "international policeman."

The case arose out the crash of an Indian Airlines flight involving an Airbus A320 in Bangalore, killing ninety-two persons and injuring the surviving passengers. Four British citizens living in London were killed and four were injured. In addition, there were three Americans who were also killed; none, however, were from Texas. In February 1992, the English plaintiffs filed suit against the airline and airport company in India. The English claimants subsequently settled with the airline for the full amount of its limited liability. They also initiated suit in Texas against several parties, the most significant being Airbus Industrie, the manufacturer of the

27. *American Home Assurance Corp.*, 603 F. Supp. at 636, 643.

28. *Farrell Lines*, 1997 WL 570494, at *11.

29. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

30. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

31. *Airbus Industrie GIE v. Patel*, [1998] 2 All ER 257, [1998] 2 WLR 686 (H.L.). The Court of Appeals decision of July 31, 1996, [1997] 2 Lloyd's Rep 8, granting an injunction is reproduced in the August 12, 1996, edition of THE TIMES. The lower court opinion is reproduced in the May 21, 1996, edition of THE TIMES.

aircraft.³² The English claimants sought recovery based on strict liability in Texas, a basis not available in India. In addition, the Texas forum offered the potential for punitive damages and contingent fees unavailable in India.

In late 1992, Airbus initiated its own proceedings in India and eventually in April 1995 obtained permanent injunctive relief, restraining the English claimants from suing Airbus anywhere but in Bangalore. The English claimants did not submit to the jurisdiction of the Indian court in connection with proceedings by or against Airbus.

Airbus subsequently filed in England for injunctive relief relating to the Indian judgment of April 1995 against the English claimants. The English High Court determined that it could consider issuing an antisuit injunction even when the English court would not be the natural forum for the litigation, but based on the facts it denied injunctive relief.

The Court of Appeals reversed. While it found it appropriate to extend antisuit injunctions to situations where the action being allowed to proceed was outside of England, the court found injustice because forum non conveniens was not available in Texas in cases such as this one. The court, after determining that India was the appropriate forum, balanced the prejudice to Airbus against the deprivation of "legitimate advantages" the English claimants would enjoy in litigating in Texas. Texas rather was a "manifestly inappropriate forum," having no connection to the parties or claims. Because the English claimants chose not to sue Airbus in India or alternatively in France, another appropriate forum under the Brussels Convention, but rather to sue in a "clearly inappropriate forum," the Court of Appeals described this conduct as "prima facie oppressive." Of crucial significance to the ultimate decision that Texas was an inappropriate forum was the determination that dismissal based on forum non conveniens was not available.

The House of Lords reversed the granting of the injunction. Lord Goff identified the issue as determining "for the first time, the limits which comity imposes" on the granting of antisuit injunctions "as the ends of justice require." Although the appeal concerned the granting of an antisuit injunction, Lord Goff, in his opinion, focused first on ways in which clashes between jurisdiction are resolved. He contrasted the civil law system as exemplified by the Brussels Convention which allocates jurisdiction "on the basis of well-defined rules" with the common-law doctrine of forum non conveniens—"a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum." The doctrine of forum non conveniens is relevant since the legitimacy of the injunction was dependent in part on the determination of the appropriate forum for the litigation. An antisuit injunction, available "when the ends of justice require it," may be granted in what Lord Goff referred to as "an alternative forum case" (here Texas and India) and also in single forum cases (when an English court is asked to enjoin a party from proceeding in a foreign court with jurisdiction).

The focus of the opinion is on what limits should be placed on issuing an antisuit injunction, in particular in the form of comity. The opinion reviews the treatment of antisuit injunctions in England, Australia, Canada, and then the United States, including describing the split among circuits. Lord Goff discusses with approval the *Laker* case and the stricter approach taken by

32. See *Linton v. Airbus Indus.*, 934 S.W.2d 754 (Tex. App.—Houston [14th Dist.] 1996, *application for writ of error filed Jan. 27, 1997*). See also *Linton v. Airbus Indus.*, 30 F.3d 592 (5th Cir. 1994). The Texas litigation involved challenges to jurisdiction, both subject matter and personal, although Airbus eventually agreed to personal jurisdiction. At the time that the English Court of Appeals issued its antisuit injunction, the Texas trial court had dismissed the claims against Airbus based on the Foreign Sovereign Immunity Act. This decision, however, was pending appeal and was reversed after the English appellate court rendered its decision.

the Second and Sixth Circuits.³³ Finally, Lord Goff defines the normal requirements of comity before granting an antisuit injunction. "[C]omity requires that the English forum should have a sufficient interest in, and connection with, the matter in question to justify the indirect interference with the foreign court which an antisuit injunction entails." Applying these principles to the *Airbus* facts, Lord Goff finds that it would be a breach of comity even when the Indian court is powerless to act and the Texas court, likewise, cannot act in the absence of the doctrine of forum non conveniens, a "principle [that] is by no means universally accepted, and in particular is not accepted in most civil law countries."

In his closing comments, Lord Goff eloquently pleads for comity in the face of excesses in jurisdiction and multiple proceedings:

Airbus is relying simply on the English court's power of itself, without direct reliance on the Indian court's decision, to grant an injunction in this case where, unusually, the English jurisdiction has no interest in, or connection with, the matter in question. I am driven to say that such a course is not open to the English courts because, for the reasons I have given, it would be inconsistent with comity. In a world which consists of independent jurisdictions, interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene. The basic principle is that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place. Such are the limits of a system which is dependent on the remedy of an antisuit injunction to curtail the excesses of a jurisdiction which does not adopt the principle, widely accepted throughout the common law world, of forum non conveniens.³⁴

These closing comments highlight the divergent approaches to parallel proceedings and the need for a unified approach. Failing the existence of a unified approach, such as forum non conveniens might supply, comity should be the guiding principle, justifying a court's abstention or stay or its grant of an antisuit injunction.

II. Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act

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The Foreign Sovereign Immunities Act (FSIA)³⁵ codifies the "restrictive theory" of foreign sovereign immunity and provides the exclusive means for obtaining jurisdiction over foreign

33. Federal courts in the United States deciding whether to enjoin parallel proceedings in foreign forums generally divide into two camps: those, such as the D.C., Seventh, and Sixth Circuits, that follow the *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) "sparingly used" approach (at least so it is said), and those that use the more liberal approach of the Fifth, Seventh, and Ninth Circuits. Assuming that the suits involve the same parties and that the resolution of the case in the enjoining court would be dispositive of the action being enjoined, courts look to see if there is an exception to the general rule favoring concurrent litigation. The *Laker* approach recognizes exceptions when the injunction is necessary (1) to protect the enjoining court's jurisdiction or (2) to protect important public policy of the forum. "[D]uplication of parties and issues alone is not sufficient to justify the issuance of an antisuit injunction." *Laker*, 731 F.2d at 928 (footnote omitted). The liberal standard of enjoining parallel proceedings in cases of duplicative litigation, as illustrated by the Fifth, Seventh, and Ninth Circuit approaches, accords less weight to comity and more to whether the litigation is vexatious or would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause." For a thorough discussion of the two approaches to antisuit injunctions, see George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985). See generally Teitz, *supra* note 2, at 233-50.

34. *Airbus* [1998] 2 WLR 686.

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35. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994).

states and their political subdivisions, agencies, and instrumentalities in courts of the United States.³⁶ It protects such entities from suit unless their actions fall within one of several enumerated exceptions.³⁷

In 1998, the courts examined several aspects of the FSIA. Among other things, they addressed the applicable time for determining whether a foreign entity qualifies as a "foreign state," considered whether the third prong of the commercial activity exception requires a "legally significant act," clarified several aspects of the new state-sponsored terrorism exception, and established limits on jurisdictional discovery.

A. FOREIGN STATE STATUS

In order to determine whether the FSIA applies to a defendant, a court must first determine whether the defendant is a "foreign state." The FSIA defines "foreign state" to include an "agency or instrumentality of a foreign state," which it in turn defines in relevant part as an entity "a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof."³⁸

Courts in 1998 addressed the appropriate time for examining the majority ownership of an entity and thus the time for determining whether a foreign entity qualifies for protection under the FSIA. The Fifth Circuit held that a foreign entity constitutes an "agency or instrumentality" protected by the FSIA as long as a foreign state owned a majority of the entity's stock at the time the underlying conduct occurred. In *Pere v. Nuovo Pignone, Inc.*,³⁹ the survivors of an employee killed in a turbine explosion off the coast of Angola brought a wrongful death suit against the turbine's manufacturer. At the time of the accident, an agency or instrumentality of the Italian government owned a majority of the manufacturer's stock. By the time the survivors filed suit, however, the manufacturer's Italian-owned parent company had transferred the manufacturer's stock to a consortium of private companies.

The court noted that the issue of "[w]hether the FSIA covers an entity now private that was state owned at the time of the disputed event(s)" was a question of "first impression" for the Fifth Circuit, and that the Eighth and Ninth Circuits have decided the question differently.⁴⁰ The court ultimately determined that including such entities within the FSIA's coverage best promotes the FSIA's purposes because the foreign policy concerns underlying the FSIA "do not necessarily disappear when a defendant loses its foreign status before suit is filed."⁴¹ The court therefore concluded that a foreign entity's status should be determined as of the date that the underlying conduct occurred, and it accordingly held that the turbine manufacturer constituted an "agency or instrumentality" of a foreign state under the FSIA.⁴²

The Southern District of New York held that a foreign entity constitutes an "agency or instrumentality" protected by the FSIA *either* if the foreign state owned a majority of the

36. See H.R. Rep. No. 94-1487, at 12 (1976), *supra* note 13.

37. See 28 U.S.C. § 1604 (1994).

38. *Id.* § 1603(a)-(b).

39. *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477 (5th Cir. 1998).

40. *Id.* at 480 (discussing *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) (holding that the FSIA covers such entities because the appropriate date for determining an entity's status is the date that the underlying conduct occurred), and *Straub v. A.P. Green*, 38 F.3d 448 (9th Cir. 1994) (holding that the FSIA does not cover such entities because the appropriate date for determining an entity's status is the date that the plaintiff filed suit)).

41. *Id.* at 481.

42. See *id.* at 480.

entity's stock at the time the underlying conduct occurred or if the foreign state owned a majority of the stock at the time the plaintiff filed suit. In *Jugobanka A.D. Belgrade v. Sidex International Furniture Corp.*,⁴³ a bank filed suit against a Slovenian corporation in state court to enforce defaulted loan agreements related to lines of credit. The Slovenian corporation was privately owned at the time the plaintiff filed suit, but at the time the alleged conduct occurred, it was majority owned by the former Socialist Federated Republic of Yugoslavia (SFRY) or political subdivisions of the SFRY.⁴⁴ The corporation removed the action to federal court, and the bank filed a motion to remand.⁴⁵

The court determined that the Second Circuit has not definitively addressed the question of the relevant time period for determining foreign state status.⁴⁶ After noting that some courts examine ownership at the time the underlying conduct occurred and some examine ownership at the time of the lawsuit, the *Jugobanka* court created a "unified approach consistent with the objectives of the FSIA" by combining both alternatives.⁴⁷ The court held that the FSIA applies, and a foreign entity is therefore entitled to a federal forum, either if: (1) "the underlying conduct took place on the foreign state's watch," even if that state no longer owned the entity at the time of the lawsuit; or (2) the foreign state owned a majority of the entity's stock at the time of the lawsuit, even if it did not own the entity at the time of the underlying conduct.⁴⁸ Since the SFRY or its political subdivisions owned the Slovenian corporation at the time it allegedly defaulted as the guarantor of the lines of credit, the court held that it was entitled to a federal forum and therefore denied the bank's motion to remand.⁴⁹

B. EXCEPTIONS

1. Commercial Activity Exception

The commercial activity exception abrogates sovereign immunity in any case in which the action is based upon: (1) a commercial activity carried on in the United States by the foreign state; (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.⁵⁰

In 1998, the courts struggled with whether the third, "direct effect in the United States," prong of the commercial activity exception requires the foreign state to have engaged in a

43. See *Jugobanka v. Sidex Int'l Furniture Corp.*, 2 F. Supp. 2d 407 (S.D.N.Y. 1998).

44. See *id.* at 409.

45. When actions are filed against entities that fall within the FSIA, they may remove them from state to federal court. See 28 U.S.C. § 1441(d) (1998).

46. See *Jugobanka*, 2 F. Supp. 2d at 412.

47. *Id.*

48. *Id.* at 414.

49. See *id.* at 415. *Accord* *Sablic v. Croatia Line*, 719 A.2d 172, 175 (N.J. Super. Ct. App. Div. 1998) ("A defendant is immune from suit pursuant to the Act if it was a 'foreign state' . . . either when the conduct occurred which is the basis for the suit or when the complaint was filed." (citations omitted)). See also *Daly v. Castro Llanes*, No. 98 Civ. 1196 (AGS), 1998 WL 879268, at *7-12 (S.D.N.Y. Dec. 10, 1998) (holding that a foreign bank that was privately owned at the time of the underlying conduct but wholly owned by an agency of the Republic of Venezuela at the time of the lawsuit qualified as an "agency or instrumentality" of a foreign state for purposes of the FSIA's service of process requirements, but also holding that the bank's actions were "commercial" for purposes of the FSIA's commercial activity exception in part because the bank was privately owned at the time that the underlying conduct occurred).

50. See 28 U.S.C. § 1605(a)(2) (1998).

"legally significant act" in the United States. In *Hanil Bank v. PT. Bank Negara Indonesia*, the Second Circuit reaffirmed its prior holdings that a "legally significant act" giving rise to the claim must occur in the United States in order to satisfy the FSIA's requirement that the direct effect occur "in the United States."⁵¹ A financial loss suffered by a United States citizen in the United States does not suffice.⁵² In *Hanil Bank*, the plaintiff had sued a bank owned by Indonesia for breach of a letter of credit that the Indonesian bank had issued.⁵³ The letter of credit required the bank to pay at a location designated by the plaintiff, and the plaintiff designated New York City, but the bank refused to pay.⁵⁴ The Second Circuit concluded that, because the breach of contract, "the most legally significant act," occurred in the United States when the bank failed to pay the requisite funds to the designated New York bank, the bank's actions caused a direct effect in the United States and therefore fell within the commercial activity exception to the FSIA.⁵⁵

The Fifth Circuit, however, rejected the "legally significant act" requirement.⁵⁶ In *Voest-Alpine Trading USA Corp. v. Bank of China*,⁵⁷ a domestic seller had similarly sued a foreign instrumentality, the Bank of China, for breach of a letter of credit that the bank had issued. Because the United States plaintiff suffered a financial loss in the United States as a result of the bank's actions, the Fifth Circuit concluded that the bank's actions caused a direct effect in the United States for purposes of the third prong of the commercial activity exception.⁵⁸

The court rejected the bank's argument that its actions did not cause a direct effect in the United States because neither the "place of payment" nor any other "legally significant act" occurred in the United States.⁵⁹ The court acknowledged that other circuits have adopted such a requirement, but it refused to follow those courts because it concluded that (1) the statutory text does not support such a requirement, and (2) imposing such a requirement would make the second and third prongs of the commercial activity exception indistinguishable.⁶⁰

2. State-Sponsored Terrorism Exception

In the Antiterrorism and Effective Death Penalty Act of 1996, Congress enacted amendments to the FSIA that created an exception to the immunity of those foreign states that the State Department officially designates as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act, that results in the death or personal injury of a United States national.⁶¹ Congress subsequently enacted further amendments as part of the 1997 Omnibus Consolidated Appropriations

51. *Hanil Bank v. PT Bank Negara Indon.*, 148 F.3d 127 (2d Cir. 1998).

52. *See id.* at 133-34.

53. *See id.* at 127.

54. *See id.* at 129-30.

55. *Id.* at 133. *See also* *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (reaffirming "legally significant acts" test).

56. *See Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 897 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 591 (1998).

57. *Id.*

58. *See id.* at 896-97.

59. *See id.*

60. *See id.* at 894-95.

61. *See* Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241-42 (1996) (codified at 28 U.S.C. § 1605(a)(7)). The terrorist acts that the exception covers include "an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking." 28 U.S.C. § 1605(a)(7).

Act that made punitive damages available against officials, employees, and agents of a foreign state in actions brought under the state-sponsored terrorism exception.⁶²

Several courts addressed these amendments in 1998. The Second Circuit upheld the constitutionality of the exception's provision of subject matter jurisdiction in *Rein v. Socialist People's Libyan Arab Jamabiriya*.⁶³ The case involved a suit against Libya filed by the survivors and representatives of persons killed aboard Pan Am 103 over Lockerbie, Scotland. Libya objected to the court's exercise of subject matter jurisdiction pursuant to the state-sponsored terrorism exception on the ground that the exception creates subject matter jurisdiction over foreign sovereigns only if the State Department designates the particular foreign state as a sponsor of terrorism. Libya contended that the exception unconstitutionally delegates the core legislative power of determining the subject matter jurisdiction of the federal courts to the State Department.

The Second Circuit agreed with Libya that several courts have expressed doubts as to whether Congress can constitutionally delegate the power to control the jurisdiction of the federal courts, but the court concluded that no delegation had in fact occurred in the case. Congress, rather than the State Department, decided to subject Libya to jurisdiction under the state-sponsored terrorism exception. Since Libya was already on the State Department's list of foreign state sponsors of terrorism at the time Congress enacted the state-sponsored terrorism exception, no decision by the State Department was needed to create jurisdiction over Libya for its alleged role in the bombing of Pan Am 103. Jurisdiction instead existed at the moment the amendment became law. The court noted, however, that a litigant might be able to raise the issue of unconstitutional delegation if the State Department places a new foreign sovereign on the relevant list or deletes a foreign sovereign from the list in effect when the exception was enacted. If the former situation occurs, a foreign sovereign defendant might have a valid delegation defense, and if the latter situation occurs, a plaintiff might have such a defense. Since Libya was on the list at the time the exception was enacted, however, and therefore could not raise such a defense, the court declined to decide the issue.

The District Court for the District of Columbia issued two opinions that clarified various aspects of the state-sponsored terrorism exception. The opinions conflicted, however, as to the availability of punitive damages against the foreign state itself. In *Flatow v. Islamic Republic of Iran*, the estate of an American student killed in a suicide bomber attack on a tourist bus in Israel filed a wrongful death claim against Iran and its officials.⁶⁴ The court awarded substantial damages to the estate and held, among other things, that: (1) the amendments apply retroactively;⁶⁵ (2) federal common law supplies the rules of decision in a case brought pursuant to the amendments;⁶⁶ (3) the extraterritorial application of the amendments is proper and was congressionally intended;⁶⁷ (4) "the routine provision of financial assistance to a terrorist group in support of its terrorist activities constitutes the provision of material support or resources within the meaning of the exception;"⁶⁸ (5) the actions of a foreign state's officials, employees, or agents may be imputed to the foreign state if they routinely provide material support or resources to a terrorist group whose activities are

62. See Pub. L. No. 104-208, § 589, 110 Stat. 3008, 3009-172 (1996) (reprinted in note following 28 U.S.C.A. § 1605).

63. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

64. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

65. See *id.* at 13-14.

66. See *id.* at 14-15.

67. See *id.* at 15-16.

68. *Id.* at 18.

consistent with the foreign state's customs or policies;⁶⁹ (6) a foreign state is not a "person" entitled to the protections of constitutional due process, but even if it is, a United States court may constitutionally exercise personal jurisdiction where the factual predicate required by the state-sponsored terrorism exception is present;⁷⁰ (7) defenses such as head-of-state immunity and forum non conveniens are not available in suits brought pursuant to the state-sponsored terrorism exception;⁷¹ and (8) Congress intended to alter section 1606's general prohibition on punitive damages against foreign states in order to deter state-sponsored terrorism, and the amendments to the FSIA therefore should be construed to permit punitive damages against foreign states as well as their agents.⁷²

In a subsequent case against Iran, however, the D.C. district court held that punitive damages are *not* available against the foreign state itself under the state-sponsored terrorism exception.⁷³ In *Cicippio v. Islamic Republic of Iran*, United States citizens sued Iran for injuries they suffered in the course of their kidnapping, imprisonment, and torture by agents of Iran in Beirut, Lebanon.⁷⁴ The court awarded compensatory damages but concluded that section 1606 of the FSIA applies to causes of action brought pursuant to the state-sponsored terrorism exception and therefore refused to award punitive damages against Iran.⁷⁵ Although the court cited *Flatow* for various propositions throughout its opinion, it did not discuss *Flatow's* contrary conclusion on punitive damages.⁷⁶

C. JURISDICTIONAL DISCOVERY

The D.C. Circuit restricted the ability of plaintiffs to depose foreign cabinet-level officials in order to determine the applicability of an FSIA exception. In *In re Papandreou*, a Liberian corporation and its president filed a breach of contract action against the Greek Minister of Tourism and other Greek government entities following revocation of the corporation's casino license in Greece.⁷⁷ After the defendants filed a motion to dismiss based on several jurisdictional grounds, including the FSIA, the district court ordered oral depositions of various Greek cabinet ministers to determine if any FSIA exceptions applied.⁷⁸

The D.C. Circuit issued a rare writ of mandamus to vacate the discovery order, holding that the district court had erred in two respects.⁷⁹ First, the district court erred in ordering the oral depositions of cabinet-level officials without first considering less intrusive means of obtaining the requested information such as interrogatories or depositions of lower-level Greek officials.⁸⁰ Second, the district court should have considered the other potentially dispositive jurisdictional

69. *See id.*

70. *See id.* at 19-23. Specifically, the court held that a foreign state that sponsors terrorist acts that cause the death or personal injury of a United States national has sufficient "minimum contacts" with the United States such that the maintenance of a suit against it would not offend traditional notions of fair play and substantial justice. *See id.* at 21-23.

71. *See id.* at 24-25.

72. *See id.* at 25-27.

73. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

74. *See id.*

75. *See id.* at 69. *See also* *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1248-49 & n.8 (S.D. Fla. 1997) (similarly concluding that, although section 1606 did not preclude punitive damages against the Cuban Air Force, it did preclude such damages against Cuba itself).

76. *See id.*

77. *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998).

78. *See id.*

79. *See id.*

80. *See id.* at 253-54.

defenses that the defendants had asserted before allowing FSIA discovery.⁸¹ Although the court acknowledged that the resolution of other jurisdictional defenses before the immunity defense might irreparably impair the benefits of immunity, it nonetheless held that "[i]f one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first" in order to minimize the total costs imposed on the defendant.⁸²

III. Forum Selection and Forum Non Conveniens

EDGARD ALVAREZ*

Parties to international transactions frequently seek to eliminate through the use of forum selection clauses the uncertainty of being forced to litigate in unexpected venues any claims arising under their contracts.⁸³ Such provisions were recognized to be enforceable in the United States by the 1971 Supreme Court decision in *The Bremen v. Zapata Offshore Co.*⁸⁴ and can be challenged only on limited grounds.⁸⁵ A dispute over the validity of a forum selection clause usually arises in the context of a defendant's challenge to the plaintiff's commencing suit in a forum other than that chosen in the agreement.⁸⁶ Although such a challenge usually involves a challenge to the jurisdiction of the court selected by the plaintiff,⁸⁷ that is not always the case.⁸⁸ In contrast, application of the forum non conveniens doctrine⁸⁹ as the grounds for dismissal is premised on the assumption that the court has jurisdiction over the defendant and the claims.⁹⁰

A. 1998 DEVELOPMENTS ON FORUM SELECTION CLAUSES

1. *Forum Selection Clauses and the Anti-waiver Provisions of the U.S. Securities Laws*

The trepidations sent throughout the U.S. legal community by the 1997 decision in *Richards v. Lloyd's of London* came to an end in 1998.⁹¹ In *Richards I*, a panel of the Ninth Circuit held unenforceable the choice of law and choice of forum provisions used by Lloyd's of London

81. See *id.* at 253-54.

82. *Id.* at 254.

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83. See *Carnival Cruise*, 499 U.S. at 593-94.

84. See *Bremen*, 407 U.S. at 12-13.

85. *Bremen* articulated three such grounds: (1) if the forum selection was inserted in the agreement as a result of fraud, undue influence, or overreaching; (2) if the choice of forum contravenes a strong public policy of the forum where the suit is brought; or (3) if trial in the contractual forum would be so gravely difficult and inconvenient that giving effect to the clause would, for practical purposes, amount to a denial of the right to a day in court. See *Bremen*, 407 U.S. at 12, 15, 18.

86. See *id.*

87. See, e.g., *Carnival Cruise*, 499 U.S. at 588; *New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24 (2d Cir. 1997).

88. See *New Moon*, 121 F.3d at 28 (explaining that no consensus exists as to the proper procedural mechanism to request dismissal of a suit based on a valid forum selection clause). See also *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998).

89. In the words of the Supreme Court, "the principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

90. See *id.*

91. *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997) [hereinafter *Richards I*]. See also Dhindsa and Ostrove, *International Legal Developments in Review: 1997—International Litigation—Forum Selection and Forum Non Conveniens*, 32 INT'L LAWYER 233 (1998).

in its contracts with U.S. underwriting syndicate members.⁹² The provisions, which called for application of English law by English courts, were found by the panel to violate the anti-waiver provisions of the U.S. securities laws.⁹³

Upon reconsideration *en banc*, the Ninth Circuit withdrew *Richards I*⁹⁴ and affirmed the district court's decision to enforce the choice of law and forum selection clauses.⁹⁵ In doing so, the Ninth Circuit brought itself in line with six other circuits that had ruled on the issue.⁹⁶ *Richards II* starts with the premise that under the *Bremen* analysis "courts should enforce choice of law and choice of forum clauses in cases of freely negotiated private international agreement[s]."⁹⁷ Then, relying on *Scherk v. Alberto-Culver Co.*,⁹⁸ *Richards II* rejects the contention that to enforce the agreement to litigate the plaintiffs' claim in England would contravene the strong public policies embodied in federal and state securities laws.⁹⁹

A case closely watched in the aftermath of *Richards I* was *Stamm v. Barclays Bank of New York*, a Second Circuit decision also involving the enforceability of the Lloyd's choice of law and forum selection clauses.¹⁰⁰ Although the Second Circuit had already passed on the enforceability of such clauses,¹⁰¹ it had done so relying, in part, on the fact that the Securities and Exchange Commission had "consistently exempted Lloyd's from the registration requirements of the securities laws."¹⁰² The SEC's filing of an *amicus curiae* brief in the Ninth Circuit expressing the agency's support for the conclusions of *Richards I* led some to believe that the Second Circuit's decision in *Roby* might no longer be good law. In *Stamm*, the Second Circuit rejected such contentions, characterizing its holding in *Roby* as resting "primarily on the adequacy of English law to deter fraud and misrepresentation, to encourage full disclosure and to provide plaintiffs remedies in the event of a fraud."¹⁰³

2. Challenges to the Enforceability of the Contract as a Whole

In *Afram Carriers, Inc. v. Moeykens*,¹⁰⁴ the Fifth Circuit upheld the enforcement of a forum selection clause contained in a settlement and release executed in Peru by the widow and heirs of a security guard who died aboard the defendant's ship from inhalation of toxic substances used to fumigate the vessel.¹⁰⁵ The court rejected the attack on the forum selection clause as

92. *Richards I*, 107 F.3d at 1428-29.

93. *See id.*

94. *Richards v. Lloyd's of London*, 135 F.3d 1289, *cert. denied*, 119 S. Ct. 365 (1998) [hereinafter *Richards II*].

95. *See id.*

96. *See, e.g.*, *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992). Shortly after *Richards II* was decided, the Eleventh Circuit joined these seven other circuits in upholding the Lloyd's choice of law and forum selection clauses. *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (1998).

97. *Richards II*, 135 F.3d at 1292-93 (quoting *Bremen*, with internal quotation marks omitted).

98. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (enforcing arbitration before the International Chamber of Commerce in a dispute involving a securities transaction).

99. *See Richards II*, 135 F.3d at 1294.

100. *Stamm v. Barclays Bank of N.Y.*, 153 F.3d 30 (2d Cir. 1998).

101. *See Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993).

102. *Id.* at 1365-66.

103. *Stamm*, 153 F.3d at 33.

104. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998).

105. *See id.* at 300.

procured through fraud, overreaching, and mistake because it found that the allegations, if proven, would affect the entire settlement and release agreement and not the specific forum selection clause.¹⁰⁶

By contrast, in *Evolution Online Systems v. Koninklijke PTT Nederland*,¹⁰⁷ the Second Circuit held that it was premature for the lower court to determine that the parties were bound by a forum selection clause contained in several drafts exchanged during the unsuccessful preparation of a final written agreement.¹⁰⁸ Since the forum selection clause found by the lower court specifically related to any dispute arising from the contract that the parties were negotiating, if no contract was found to exist, the language of the forum selection clause could not operate to deprive the plaintiff of its right to sue in a court other than the one chosen in the forum selection clause.¹⁰⁹

B. 1998 DEVELOPMENTS ON FORUM NON CONVENIENS

By its terms, the Second Circuit decision in *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*¹¹⁰ appeared to have relaxed the burden of persuasion faced by U.S. defendants seeking to have claims asserted by a foreign plaintiff dismissed on forum non conveniens grounds. In *Crown*, an Indonesian corporation sued its minority shareholder, a Pennsylvania corporation, alleging breach of a shareholder agreement.¹¹¹ Refusing to reverse the lower court's forum non conveniens dismissal, the Second Circuit reasoned that "on the record before it, the district court might have employed its discretion to rule either way on defendant Crown's forum non conveniens motion. The inquiry could reasonably have rendered either result."¹¹² This analysis, which would appear to introduce an "all things being equal, dismiss" standard, is hard to reconcile with the principle announced by the Supreme Court in *Gulf Oil Corp. v. Gilbert*,¹¹³ still the leading forum non conveniens case, according to which, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."¹¹⁴ In subsequent 1998 decisions, however, the Second Circuit made no mention of its language in *Crown*, and used, instead, the traditional *Gilbert* analysis.¹¹⁵

In *Boosey & Hawkes Music Publishers v. Walt Disney Co.*,¹¹⁶ the Second Circuit reversed the lower court's forum non conveniens dismissal of the plaintiff's claim that the distribution of the film *Fantasia* in several foreign countries violated the plaintiff's rights under the copyrights laws of eighteen countries.¹¹⁷ Reversing the lower court's decision to dismiss based, in part, on the difficulty of applying so many foreign laws,¹¹⁸ the court indicated that "it seems . . .

106. *See id.* at 302 nn.3-4.

107. *Evolution Online Sys. v. Koninklijke PTT Nederland*, 145 F.3d 505 (2d Cir. 1998).

108. *See id.* at 509.

109. *See id.*

110. *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d 65 (2d Cir. 1998).

111. *See id.* at 68.

112. *Id.* at 75.

113. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

114. *Id.* at 508.

115. *See, e.g., Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998); *Evolution Online Sys. v. Koninklijke PTT Nederland*, 145 F.3d 505 (2d Cir. 1998); *Capital Currency Exch. v. National Westminster Bank*, 155 F.3d 603 (2d Cir. 1998); *Alfadda v. Fenn*, 159 F.3d 41; *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

116. *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998).

117. At issue were the plaintiff's copyrights to Stravinsky's "The Right of Spring." *See id.* at 483.

118. *See Boosey & Hawkes Music Publishers v. Walt Disney*, 934 F. Supp. 119, 125 (S.D.N.Y. 1996).

likely that Disney's motion seeks to split the suit into 18 parts in 18 nations, complicate the suit, delay it, and render it more expensive . . . Everything before us suggests that trial would be more easy, expeditious and inexpensive in the district court than dispersed to 18 foreign nations."¹¹⁹

In addition to addressing the enforceability of a draft forum selection clause as such, in *Evolution Online Sys. v. Koninklijke PTT Nederland*,¹²⁰ the Second Circuit addressed the import of such a clause in a non-contractual forum non conveniens analysis. The court first reiterated the principle announced by the Supreme Court in *Gilbert* that "requires a court to defer to a plaintiff's choice of forum unless the forum non conveniens factors strongly favor dismissal, especially when the plaintiff resides in the forum state."¹²¹ The court added, however, that it was persuaded by the decision in *Kultur International Films Ltd. v. Covent Garden Pioneer, FSP, Ltd.*¹²² to the effect that, where the parties exchanged proposed drafts of an agreement containing a forum selection clause not included in the final agreement, and the reason for its omission is unclear, a court must factor the proposed forum selection clause into its forum non conveniens analysis by starting its review of the *Gilbert* factors "with a level set of balances, rather than one weighed heavily in favor of the plaintiff's choice of forum."¹²³

Acknowledging its disagreement with the Fifth Circuit,¹²⁴ in *Capital Currency Exchange v. National Westminster Bank*¹²⁵ the Second Circuit reaffirmed its 1987 holding in *Transunion Corp. v. PepsiCo, Inc.*¹²⁶ that antitrust claims are subject to dismissal on forum non conveniens grounds.¹²⁷

IV. Extraterritorial Application of U.S. Law

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The United States legal system does not abide by a unified and strict set of rules regarding when its laws may be applied to persons or events outside its borders. For this reason, the U.S. courts have continually struggled to find an appropriate balance between a general presump-

119. *Boosey & Hawkes*, 145 F.3d at 492.

120. *See id.* at 505.

121. *Id.* at 510 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)).

122. *Kultur Int'l Films Ltd. v. Covent Garden Pioneer, FSP, Ltd.*, 860 F. Supp. 1055 (D. N.J. 1994).

123. *Boosey & Hawkes*, 145 F.3d at 511.

124. *See Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982).

125. *Capital Currency Exch. v. National Westminster Bank*, 155 F.3d 603 (2d Cir. 1998).

126. *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1998).

127. *See Capital Currency*, 155 F.3d at 609. Finally, the unreported Ninth Circuit decision in *Melton v. Oy Nautor AB*, 1998 U.S. App. Lexis 22100 (9th Cir. 1998), raises the interesting question of whether forum non conveniens applies at all to enforcement of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), implemented at 9 U.S.C. § 201 (1994). The district court dismissed the action seeking enforcement of a Finnish arbitral award for forum non conveniens reasons. Because it was not properly raised below, the Ninth Circuit did not pass upon the appellant's contention that the New York Convention precludes application of the forum non conveniens doctrine. Instead, over a strong dissent by Judge Tashima, the majority undertook a *Gilbert* analysis of the lower court's decision and found that there was no abuse of discretion in the dismissal. Judge Tashima dissented, arguing that the *Gilbert* analysis is not adequate in cases involving enforcement of foreign arbitral awards. In the dissent's view, consideration of "practical problems that make the trial of a case easy, expeditious and inexpensive" or of "the burden of jury duty on the community" (all of which are part of a traditional *Gilbert* analysis) are simply inapposite in the context of the enforcement of a foreign arbitration award.

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tion against extraterritoriality,¹²⁸ concerns for international law and comity,¹²⁹ and an application of U.S. laws that comports with congressional intent and constitutional limits—even when such application heads overseas.¹³⁰ The analysis set out by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*,¹³¹ as it has evolved over time,¹³² has become the traditional solution to this problem. Under this analysis, courts balance multiple factors in determining whether a law should apply extraterritorially.¹³³

This past year has brought a steady stream of cases in which the U.S. courts dealt with these questions. The cases ranged from reviews of the extraterritorial applications of U.S. antitrust laws in light of recent changes to the *Timberlane* analysis and considerations of the domestic conduct required for U.S. securities laws to apply to overseas transactions to findings regarding the overseas effect of bankruptcy injunctions and the recoverability of damages for extraterritorial acts of copyright infringement.

A. ANTITRUST—SUBSTANTIAL CLAIM OF TRUE CONFLICT INSUFFICIENT

In *Hartford Fire*, the Supreme Court emphasized the importance of a “true conflict” between U.S. and foreign law to the comity test used for deciding whether U.S. antitrust laws should apply to overseas conduct.¹³⁴ Since that decision, federal circuit courts have been unclear as to whether the basic comity test as, for example, set forth in the *Restatement*, remains valid, or whether the entire analysis turns on the ability of a party to comply with regulations of both the United States and a foreign government.¹³⁵ Last year, we noted that the Second Circuit would have the opportunity to review the appropriateness of a comity balancing test to extraterritorial applications of the Sherman Act.¹³⁶ In *Filetech S.A. v. France Telecom S.A.*,¹³⁷ the court declined to avail itself of this opportunity, although it did clarify the standards in the Second Circuit for finding a “true conflict” between foreign and U.S. law.

In *Filetech*, the plaintiff claimed that France Telecom's refusal to make available a list of telephone customers who elect not to have their names appear on marketing lists amounted to a restraint on trade in violation of the Sherman Antitrust Act.¹³⁸ The Second Circuit did

128. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

129. See *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10. See also *PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC* 73-84 (4th ed. 1998) (reviewing limits under international law of states' prescriptive and enforcement jurisdiction, with particular attention to recent United States sanctions relating to Cuba, Libya, and Iran).

130. See *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting).

131. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976).

132. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* §§ 402-403 (1987) [hereinafter *RESTATEMENT*].

133. Relying in part on *Timberlane*, the Restatement rule is that a state has jurisdiction to prescribe laws affecting extraterritorial conduct so long as such conduct “has or is intended to have a substantial effect within its territory.” *Id.* § 402(1)(c). Even so, exercise of that jurisdiction must be reasonable, and the reasonableness factors include (a) the extent of the domestic effect, (b) the connections between the state and the persons both engaging in the regulated activity and intended to be protected, (c) the character of the conduct and extent to which it is regulated elsewhere, (d) the degree to which justified expectations would be protected or hurt, (e) the importance of the regulation on the international plane, (f) consistency of the regulation with international tradition, (g) the extent of another state's interest in regulating the conduct, and (h) “the likelihood of conflict with regulations by another state.” *Id.* §§ 403(2)(a)-(h) (emphasis added).

134. See *Hartford Fire*, 509 U.S. at 798-99.

135. *RESTATEMENT*, *supra* note 133, § 403(2)(a)-(h).

136. Michael Ostrove, *International Litigation: Extraterritorial Application of U.S. Law*, 32 *INT'L LAW* 223, 236 (1998).

137. *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998).

138. 15 U.S.C. § 1 *et seq.*

not fully address the international comity analysis, however. Explaining, in effect, that the courts' subject matter jurisdiction must be fully addressed before prescriptive jurisdiction can be analyzed, it noted that the parties hotly disputed whether a factual basis existed for subject matter jurisdiction under the FSIA and another statute. It remanded the case, therefore, on the ground that the district court had failed to address the factual disputes concerning its subject matter jurisdiction prior to determining the applicability of the Sherman Act to the overseas conduct at issue.¹³⁹ The Second Circuit did, however, disapprove the district court's holding that a "substantial claim" of a true conflict with French law met the standards set by the Supreme Court in *Hartford Fire*. Although the district court had stated the claimed conflict would go "to the heart of the case" and that French law should be decided by French courts, the Second Circuit said this was insufficient: "a conflict must be *clearly demonstrated*" in order for the conflict to be sufficient to thwart application of the statute to conduct abroad.¹⁴⁰

B. DEVELOPMENTS IN THE SECURITIES CONTEXT

1. *Seventh Circuit Takes Sides in Circuit Split*

Last year, it was noted that the Fifth Circuit had joined the Second and D.C. Circuits regarding the extent of domestic conduct required to bring a securities fraud claim in relation to an otherwise foreign transaction.¹⁴¹ Absent a requisite U.S. effect, these courts require that fraud claims under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 be grounded in domestic conduct "of material importance to" or having "directly caused" the fraud.¹⁴² In *Kautbar SDN BHD v. Steinberg*,¹⁴³ the Seventh Circuit joined these courts when it rejected the more lenient approach taken by the Third, Eighth, and Ninth Circuits.¹⁴⁴ The plaintiff in *Kautbar* made detailed allegations that the defendants had launched a fraudulent scheme, prepared the materials for use in that scheme, used the U.S. mail to send those materials, and received payment, all in the United States. The court held these claims to be "sufficient to bring the alleged conduct within the ambit of the [U.S.] securities laws."¹⁴⁵

2. *Additional Limitation in the Second Circuit*

This past year the Second Circuit drew a further limitation on the extraterritorial application of U.S. securities laws based on domestic conduct. In *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*,¹⁴⁶ the Second Circuit agreed with the plaintiff that a series of phone calls between London and Florida, during which the central alleged misrepresentations

139. See *Filetech*, 157 F.3d at 931-32.

140. *Id.* (emphasis added).

141. Ostrove, *supra* note 136, at 236.

142. See, e.g., *Robinson v. TCI/U.S. West Communications Inc.*, 117 F.3d 900, 905-06 (5th Cir. 1997).

143. *Kauthar SDN BHD v. Steinberg*, 149 F.3d 659 (7th Cir. 1998).

144. The Seventh Circuit made a further distinction in the circuit split by noting that the D.C. Circuit "appears to require that the domestic conduct at issue must itself constitute a securities violation." *Id.* at 665. It therefore claimed to join the "midground . . . identified by the Second and Fifth Circuits," between the position of the D.C. Circuit and that of the Third, Eighth, and Ninth Circuits. *Id.* at 667.

145. *Id.* Although the Court of Appeals disagreed with the district court's jurisdictional holding in this regard, it upheld dismissal of the case because the plaintiff had waived its appeal rights with regard to most of the district court's alternative grounds for dismissal by failing to address them in its opening brief.

146. *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118 (2d Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3351 (U.S. Oct. 30, 1998) (No. 98-723), 67 U.S.L.W. 3394 (U.S. Dec. 4, 1998) (No. 98-923).

were made, "ordinarily would be sufficient to support jurisdiction" over the claims.¹⁴⁷ Nevertheless, because the plaintiff and defendant companies and individuals involved were not U.S. entities or citizens, and because the securities were not traded on a U.S. exchange, the court held that "without some additional factor tipping the scales in favor of our jurisdiction . . . the exercise of prescriptive jurisdiction by Congress would be unreasonable within the meaning of the [Restatement]."¹⁴⁸

C. BANKRUPTCY

The Ninth Circuit addressed issues of both prescriptive and enforcement jurisdiction in the bankruptcy context in *In re Simon*.¹⁴⁹ In *Simon*, a personal bankruptcy proceeding under Chapter 7 of the United States Bankruptcy Code, the Hong Kong and Shanghai Banking Corporation filed a proof of claim with the court relating to its \$37 million share of a \$200 million syndicated bank loan apparently made in Hong Kong to Simon. It did not file a proof of claim relating to a \$24 million personal guarantee the debtor had granted it in connection with a separate Hong Kong loan. The debtor listed that guarantee in his bankruptcy schedules, and the bankruptcy court discharged all of his debts and enjoined creditors from seeking to collect them.

The bank sought an order that the injunction and discharge did not apply to its efforts to collect on the guarantee in Hong Kong (or that, if it did, it be modified) and that it would not be subject to sanctions in the United States for commencing collection proceedings in Hong Kong. The Ninth Circuit rebuffed the bank. Joining other courts to have considered the question, it held that Congress clearly expressed its intent that the *in rem* jurisdiction over the bankruptcy estate incorporates a fiction that the estate is, as a matter of law, entirely within the district in which the bankruptcy court sits—regardless of where the estate's assets and liabilities actually are found.¹⁵⁰ The discharge and injunction, applying to this estate, were held to be effective throughout the world.

Because the bank had participated in the U.S. bankruptcy proceedings, the Ninth Circuit did not need to address in detail whether its enforcement jurisdiction allowed it to enjoin a foreign bank from bringing a foreign collection proceeding. Its effective enforcement mechanism was simpler. The court held that because the bank had participated in the U.S. bankruptcy proceeding, it was subject to sanctions in the United States (where it has substantial assets) for any collection efforts in Hong Kong.¹⁵¹

D. COPYRIGHT—DAMAGES FOR EXTRATERRITORIAL INFRINGEMENT

The Ninth Circuit joined the Second Circuit in 1998 in permitting damages for extraterritorial conduct to be recovered under the Copyright Act.¹⁵² Defendants in *Los Angeles News Service v. Reuters Television International*¹⁵³ had made unauthorized copies of plaintiff's video of the

147. *Id.* at 129.

148. *Id.*

149. *In re Simon*, 153 F.3d 991 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 25, 1998) (No. 98-869).

150. *Id.* at 996. The Ninth Circuit particularly relied on the Seventh Circuit's recent decision in *Underwood v. Hilliard (In re Rimsat, Ltd.)*, 98 F.3d 956 (7th Cir. 1996).

151. *See id.* at 997.

152. 17 U.S.C. § 101 *et seq.* The Second Circuit cases on this subject go back to *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939) (L. Hand, J.), *aff'd*, 309 U.S. 390 (1940).

153. *Los Angeles News Serv. v. Reuters Television Int'l*, 149 F.3d 987 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 23, 1998) (No. 98-851).

infamous beating of Reginald Denny during the April 1992 riots in Los Angeles. Defendants then provided the footage to their affiliates and subscribers overseas. Confirming prior holdings that U.S. copyright laws do not apply to extraterritorial acts of infringement,¹⁵⁴ the Ninth Circuit nevertheless held that the owner of the copyright is entitled to "damages flowing from exploitation abroad of the domestic acts of infringement."¹⁵⁵

V. Choice of Law in International Litigation

COLIN B. PICKER*

A. LEX FORI APPLIES TO LEGAL FEES CLAIM

In *Arno v. Club Med Boutique Inc.*,¹⁵⁶ the Ninth Circuit Court of Appeals determined that California law, the law of the forum, should apply to the plaintiff's claim for legal fees arising out of an action involving sexual harassment by a supervisor at a resort in France. In the substantive portion of the suit, the court determined that French law applied, but was confronted with which law would apply to the later claim for legal fees. The plaintiff argued that the law that had been applied in resolving the underlying dispute should apply (French law). The defendants argued, and the court ultimately agreed, that the local law (California law) should apply. In reaching this conclusion, the Court relied on two lines of reasoning: if the fees issue is procedural, the law of the forum applies; if the fees issue is substantive, then the court must embark on a substantive choice of law analysis. The court just noted that California decisions had found the award of attorney's fees to be procedural. Then, applying a substantive choice of law analysis, the court determined that France had no interest in extending its laws to apply to the fee issue because the French fee statute was designed as a procedural mechanism, not a substantive one (as, according to the court, is the British fee arrangement). California, in contrast, has a strong "interest" in having its laws apply. Accordingly, the court applied California law, with its "American Rule" that each side must pay its own legal fees, and denied legal fees to the plaintiff.¹⁵⁷

B. COURTS OF APPEALS HOLD ANTI-WAIVER PROVISIONS OF SECURITIES LAWS DO NOT APPLY TO CHOICE OF LAW AND FORUM SELECTION CLAUSES

As discussed in Part III above, three U.S. Circuit Courts of Appeals recently joined six other circuit courts in holding that the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 prohibiting contractual waiver of U.S. securities laws do not void choice of law and forum selection clauses in an international transaction.¹⁵⁸

154. See *id.* at 990-91.

155. *Id.* at 992.

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156. *Arno v. Club Med Boutique Inc.*, 134 F.3d 1424 (9th Cir. 1998).

157. *Id.* at 1425.

158. See *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir.) (en banc); *Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285 (11th Cir. 1998) (joining the Second, Fourth, Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals); and *Stamm v. Barclays Bank of New York*, 153 F.3d 30 (2d Cir. 1998) (reaffirming an earlier similar holding).

C. FEDERAL COMMON LAW APPLIED TO VICTIM OF OVERSEAS TERRORIST BOMB

In *Flatow v. Islamic Republic of Iran*,¹⁵⁹ the D.C. District Court applied "interstitial federal common law" to an action against Iran brought under the recent terrorism exception to the Foreign Sovereign Immunities Act (FSIA). The wrongful death action against Iran was brought by the estate of an American student killed in a suicide bomber attack on a Tourist bus in the Gaza Strip. The estate claimed that Iran had financed the terrorist organization responsible for the attack. Iran never appeared in the district court and the court entered a multi-million dollar default judgment against Iran.

Among other issues before it, the court was faced with an international choice of law problem. Normally, the law of the place where the tort occurred applies. In the case before it, however, the court determined that working with the unfamiliar Gaza legal code would present administrative difficulties. Moreover, the court determined that the United States had significantly greater interest in having its law applied than did the Palestinian Authority. Not only did the United States have an interest in adjudicating the wrongful death of a U.S. citizen, but it also had an interest in fulfilling the congressional intent, reflected in the antiterrorism exception to the FSIA, that the federal courts create coherent national standards to support the act's initiative against state-sponsored terrorism.

D. CHOICE OF LAW CLAUSE NOT APPLICABLE TO ARBITRABILITY OF CLAIMS

In *Westbrook International, LLC v. Westbrook Technologies, Inc.*¹⁶⁰ a district court addressed whether a choice of law clause specifying the law of Ontario, Canada controlled the court's enforcement of the contract's arbitration clause. Application of Ontario law, according to the defendant, would mean that the claims were not arbitrable. Conversely, the plaintiff argued that the U.S. Arbitration Act applied and mandated arbitration. The court determined that the choice of law clause applied to the rights and duties of the parties, while the arbitration clause addressed arbitration. Accordingly, the court held that absent a clear intent of the parties to apply other law to the arbitration clause, the arbitrability of the contract was a matter of federal substantive law.

The court noted that its holding was consistent with the relevant international law—the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The convention, in relevant part, provides that a "court of a Contracting State . . . shall . . . refer the parties to arbitration, unless it finds that the [arbitration] agreement is null and void, inoperative, or incapable of being performed."¹⁶¹ Accordingly, after determining that the arbitration agreement contract was not null and void or incapable of operation, and because the United States and Canada are both signatories, the court held that under international law the matter must be referred to arbitration.

E. CHOICE OF LAW IN COPYRIGHT ACTIONS

In *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*,¹⁶² the Second Circuit undertook a rare examination of choice of law in the copyright context. The case centered around a suit against *Kurier*, a New York-based Russian language weekly newspaper, by Russian newspapers,

159. *Flatow v. Iran*, 999 F. Supp. 1 (D.D.C. 1998).

160. *Westbrook Int'l, LLC v. Westbrook Tech., Inc.*, 17 F. Supp. 2d 681 (E.D. Mich. 1998).

161. New York Convention on Recognition & Enforcement of Foreign Arbitral Awards art. II.

162. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2d Cir. 1998).

magazines, Russian news agencies, and the Union of Journalists of Russia. The plaintiffs claimed that the defendant illegally copied about 500 of the plaintiffs' articles without permission. Neither the parties nor the district court addressed the choice of law issue. Rather, they all assumed that Russian law applied and debated exactly how Russian law dealt with the issues before them. Plaintiffs achieved measured success (some damages and an injunction against the defendant) in the district court. On appeal, the court of appeals asked the parties to address the choice of law issue. In addition, to help it with this difficult and rarely covered aspect of choice of law, the court requested Professor William Patry to submit a brief as *amicus curiae*.

The choice of law issue presented was which country's law applies to copyright ownership and which applies to copyright infringement. The appellate court's analysis of the conflicts issue began with a determination that the U.S. Act implementing the Berne Copyright Convention did not supplant existing U.S. copyright protection, the Copyright Acts. However, that act did not itself contain provisions relevant to the issues that were before the court. Accordingly, the court stated that it would "fill the interstices of the Act by developing federal common law on the conflicts issue . . . [and in doing so, the court is] entitled to consider and apply principles of private international law . . ."¹⁶³

The court then separated the discussion of the copyright issue into the issue of copyright ownership and copyright infringement. For the ownership issue, the court applied the usual rule for property—that property interests are determined according to the law of the state with the most significant relationship to the property and the parties. Finding that the works were created by Russian nationals and first published in Russia, the court determined that Russian law should apply and that the Berne Convention suggested nothing to the contrary.

With respect to the infringement issues, the court applied the usual rule for torts—*lex loci delicti*. Because the infringement occurred in the United States, the court applied U.S. law to the infringement issues (it also remarked that to the extent a wider "interests" approach should be considered, it would still have applied U.S. law inasmuch as the defendant was a U.S. entity).¹⁶⁴

The court ultimately concluded that the Russian newspapers did not, under Russian law, have any copyright ownership in the text of the articles (although they may have had such rights in the selection, arrangement, and display of the articles). It remanded the case for further development with respect to the Russian authors' rights and certain other matters.

VI. Discovery

CHRISTOPHER JOSEPH BORDEN*

A. INTRODUCTION

American procedure regarding international discovery stems from 28 U.S.C. §§ 1781-1783, and the Federal Rules of Civil Procedure, in particular Rule 28(b). The leading case on the topic of international discovery is the Supreme Court's decision in *Société Nationale Industrielle*

163. *Id.* at 90.

164. *See id.* at 91.

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Aerospatiale v. United States District Court.¹⁶⁵ Many later cases base their reasoning on interpretations of *Aerospatiale*.

B. DEFINING PROCEEDINGS BEFORE FOREIGN TRIBUNALS ENTITLED TO AID

1. *Second Circuit Finds That Private Commercial Arbitrations Are Not Foreign or International Tribunals*

In *NBC v. Bear Stearns & Co.*,¹⁶⁶ the Second Circuit held that a private commercial arbitration was not a "foreign or international tribunal" for purposes of 28 U.S.C. § 1782. At issue was whether section 1782 empowered U.S. courts to compel third parties not bound by the arbitration contract in question to respond to subpoenas issued in relation to the arbitration. The Second Circuit began by noting that "foreign or international tribunals" is undefined in the statute, and thus "is to be given its plain or natural meaning."¹⁶⁷ Although finding the term's plain meaning to be broad enough to include both state-sponsored and private tribunals, the court concluded that reference to the statute's context was necessary to determine Congress' intent.¹⁶⁸ Reviewing the legislative history, the Second Circuit concluded that the term "tribunals" was only meant to refer to conventional courts, intergovernmental arbitral tribunals, and other state-sponsored adjudicatory bodies.¹⁶⁹ Moreover, construing section 1782 to include private commercial arbitrations would be "in stark contrast" to the limited evidence gathering capabilities of domestic arbitrations under the Federal Arbitration Act, would undermine the efficiency and cost effectiveness of international arbitration, and "thus arguably conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution . . . [and] would create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitral panels as domestic, foreign, or international."¹⁷⁰

2. *Second Circuit Parses Definition of Foreign Tribunal*

In *Euromepa S.A. v. Esmerian*,¹⁷¹ the Second Circuit found that neither a pending French bankruptcy proceeding following a final judgment by the French Supreme Court, nor a potential motion to reopen the judgment of the French Court of Appeal, met section 1782's requirement that the discovery sought be for use in a "foreign tribunal." As in prior such decisions, the Second Circuit focused its analysis "on two questions: (1) whether a foreign proceeding is adjudicative in nature; and (2) when there is actually a foreign proceeding."¹⁷² The *Euromepa* court reasoned that, while there may be bankruptcy proceedings that constitute adjudicative proceedings for the purpose of section 1782,¹⁷³ in the instant case the merits had already been adjudicated and the bankruptcy proceeding existed merely to enforce a pre-existing judgment, and thus was not adjudicative.¹⁷⁴

Regarding the issue of whether there is actually a foreign proceeding—the issue of pendency—the Second Circuit found that "a proceeding need not actually be pending, but rather that a

165. *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987).

166. *NBC v. Bear Stearns & Co.*, 1999 U.S. App. LEXIS 933 (2d Cir. Jan. 26, 1999).

167. *NBC*, 1999 U.S. App. LEXIS 933 at *11.

168. *See id.* at *12-*13.

169. *See id.* at *14-*20.

170. *Id.* at *22 (citations omitted).

171. *Euromepa S.A. v. Esmerian*, 154 F.3d 24 (2d Cir. 1998).

172. *Id.* at 27.

173. *See id.* at 28, citing *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996).

174. *See In re Letters Rogatory*, 385 F.2d 1017 (2d Cir. 1967).

proceeding must be 'imminent—very likely to occur and very soon to occur.'"¹⁷⁵ The *Euromepa* court concluded that the argument that discovery could be used regarding a potential reopening of the case was "meritless," since "Section 1782 is designed to provide discovery in aid of foreign litigation, not to provide discovery to justify the reopening of already completed foreign litigation."¹⁷⁶

C. DISCOVERY FOR PROCEEDINGS BEFORE FOREIGN OR INTERNATIONAL TRIBUNALS

1. *Third Circuit Does Not Find a Discoverability Requirement in Ordering Discovery Related to a Proceeding Before a Foreign Tribunal*

In *In re Bayer AG*,¹⁷⁷ the Third Circuit held that a petitioner for discovery under section 1782 did not need first to seek a ruling from a foreign tribunal on whether the discovery was permissible. The district court had denied Bayer's application for discovery because Bayer had not first obtained a ruling from the judge in the underlying Spanish proceeding as to whether the requested information was relevant. Reviewing the Third Circuit's previous decision in *John Deere Ltd. v. Sperry Corp.*,¹⁷⁸ the *Bayer* court stated that the *John Deere* court "held that neither reciprocity nor admissibility were controlling concerns under § 1782(a)."¹⁷⁹ If Congress had chosen to include a requirement of discoverability, it would have done so explicitly.

Importantly, the *Bayer* court found that granting discovery where it would not be available in a foreign jurisdiction would not lead other nations to perceive the United States as holding their laws in contempt.¹⁸⁰ In addressing the argument that Bayer could have gone to the Spanish court first in its attempt to obtain discovery, the Third Circuit stated that this would impose a "'quasi-exhaustion requirement' [that] . . . has been rejected by those courts that have addressed it."¹⁸¹

2. *Southern District of New York Clarifies Procedures of International Judicial Assistance*

In two decisions in *In re Letters Rogatory from Caracas, Venezuela, S.A., Concerning Cecilia Matos*,¹⁸² a New York federal court considered various issues related to international judicial assistance in response to letters rogatory. The letters were issued by a Venezuelan court asking the U.S. Department of Justice to gather certain evidence regarding Carlos Andres Perez and Cecilia Matos, his alleged common-law wife. The district court, on petition from the Department of Justice, appointed a commissioner to oversee the gathering of evidence. The commissioner subpoenaed Matos to testify, and Matos moved to quash.

175. *Euromepa*, 154 F.3d at 27, quoting *In re International Judicial Assistance (Letter Rogatory) of the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

176. *Id.* at 29.

177. *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998).

178. *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985).

179. *Bayer*, 146 F.3d at 192. The *Bayer* court found the application of *John Deere* by the district court for the proposition that there is a discoverability requirement "understandable" because at least two previous courts of appeal had come to similar conclusions. See *In re Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The court noted, however, that "[i]n contrast, the Second Circuit read *John Deere* as we do . . . [t]hat court said insightfully '*John Deere* is not a case about whether section 1782 requires discoverability, and the court never explicitly states such a requirement exists.'" *Bayer*, 146 F.3d at 192 citing *In re Gianoli Aldunate*, 3 F.3d 54, 60 (2d Cir. 1993).

180. *Bayer*, 146 F.3d at 194.

181. *Id.* at 195-96, citing *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992).

182. *In re Letters Rogatory*, 1998 U.S. Dist. LEXIS 233 (S.D.N.Y., filed Jan. 14, 1998) and 1998 U.S. Dist. LEXIS 2755 (S.D.N.Y., filed Mar. 11, 1998).

Finding that the letters could not fairly be read to include the Matos subpoena, the court quashed the subpoena, stating that "the scope of the commissioner's authority to gather evidence must be found in the text of the [letters rogatory] or it cannot be found at all."¹⁸³ Furthermore, the court found it unlikely that a Venezuelan court would order such a deposition in light of the Venezuelan constitutional protections regarding self-incrimination and spousal privileges.

In the second decision,¹⁸⁴ the court denied Matos' motion to bar transmission of a transcript of a deposition of a non-party that had been conducted not only by the commissioner, but by a member of the Venezuelan consulate as well. According to Matos, the Inter-American Convention on Letters Rogatory forbade consular officials from performing acts involving compulsion, and the questioning of the deponent by the consular official constituted the unlicensed practice of law. The court stated that it was doubtful that either Matos or the non-party deponent had standing to claim a violation of the treaty, as the treaty "creates rights in the signatory states, not in any individual or group."¹⁸⁵ Moreover, the court believed the facts did not support the contention that the consular official used compulsion in any way as he merely posed questions, and where the deponent was directed to answer, the direction came from the commissioner. In any case, the court found that the treaty provides that consular or diplomatic agents may take evidence and obtain information, and that under the Supremacy Clause, the treaty provision superseded any licensing requirement under New York law.¹⁸⁶

3. *Privilege Under Hague Evidence Convention*

At issue in *In re Letters Rogatory from the Local Court of Plon, Germany*¹⁸⁷ was whether the respondent could be compelled by a Michigan federal court to produce a blood sample to establish paternity upon request made by the Local Court of Plon, Germany in a letter rogatory where Michigan law would not require such a blood sample under the circumstances. The court assessed whether article 11 of the Hague Convention¹⁸⁸ was implicated by the Michigan law. The court agreed with the government that "[t]he fact that Michigan courts would not require a putative father to produce blood samples, once he acknowledges paternity, does not prove that such a test be precluded."¹⁸⁹ Simply stating that a blood sample would not be required under Michigan law did not constitute a privilege or duty to refuse.

D. DISCOVERY FOR PROCEEDINGS BEFORE U.S. COURTS

1. *Trial Court Addresses Use of Hague Convention Before New York State Courts*

In *Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner a.s.*,¹⁹⁰ a New York state trial court considered the relationship of the Hague Convention to state discovery rules and, echoing federal jurisprudence, found that "Hague Convention procedures are not required so long as the discovery takes

183. *Id.* at *6.

184. *See id.*

185. *Id.* at *3.

186. *See id.* at *5, citing Inter-American Convention on Letters Rogatory, arts. 2 and 13.

187. *In re Letters Rogatory*, 29 F. Supp. 2d 776, 1998 WL 884465 (E.D. Mich. Oct. 27, 1998).

188. Stating, "[i]n the execution of a letter of request, the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give evidence . . . (a) under the law of the State of execution . . ." Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, art. 11, 23 U.S.T. 2555, T.I.A.S. No. 7444.

189. *Letters Rogatory*, 1998 WL 884465 at *3 (internal quotation omitted).

190. *Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner a.s.*, 175 Misc.2d 408, 671 N.Y.S.2d 902 (Sup. Ct., N.Y. Co. Jan. 15, 1998).

place within the United States and is in no way offensive to the principles of international comity."¹⁹¹

2. *Second Circuit Finds Broad Ability to Serve Partnerships and No Mandatory Primacy of Hague Convention in Document Discovery*

This past year there were a series of decisions in relation to *First American Corporation v. Price Waterhouse LLP*, of which two are of particular note as concerns discovery of foreign non-parties through subpoenas under Federal Rule of Civil Procedure 45.

On appeal in *First American Corp. v. Price Waterhouse LLP*,¹⁹² the Second Circuit found that under New York law, a document subpoena can be served on a non-New York partnership by personal process on any partner who happens to be within New York: "If valid service is effected on any partner within the state, personal jurisdiction over the partnership is achieved."¹⁹³ Regarding whether a British court should first decide on the propriety of the requested disclosure, the Second Circuit was not persuaded by arguments that First American should be compelled to resort first to the Hague Convention in relation to demands of non-party witnesses. The Second Circuit found comity analysis to be more applicable, and it also found that the district court had done what comity requires in using the *Minpeco* factors to gauge the reasonableness of the discovery request.¹⁹⁴ If the British courts prohibited Price Waterhouse U.K. from disclosing the subpoenaed documents, the company could seek exemption from sanctions under Rule 37.¹⁹⁵ Finally, the Second Circuit concluded that the Hague Convention did not offer "a meaningful avenue of discovery in the present case" since the U.K. only permits pretrial discovery if each document sought is separately described, which would not be possible in this case.¹⁹⁶

3. *Where Depositions of Foreign Persons May Be Held*

Shortly after the Second Circuit ruling, the district court in *First American* turned to a subpoena that purported to command depositions of London-based witnesses in New York.¹⁹⁷ The foreign non-party argued that Rule 45 forbade compelling a witness to travel more than 100 miles from the place where that person resides, is employed or regularly transacts business *in person* to testify as a non-party in a deposition and that enforcement of the subpoena would violate international comity. The court concluded that the fact that the foreign non-party did business in New York through an agent was insufficient to permit a deposition in New York; "'the place' where [Price Waterhouse U.K.] and its partners and employees 'reside,' are 'employed,' or 'regularly transact[s] business in person' is not New York."¹⁹⁸ If, however, the deposition were to be conducted in England, the subpoena could not be issued from New York, as Rule 45 contemplated that the subpoena issue from the district in which the witness was and that district be no more than 100 miles from that witness's residence, employ, or place in which he or she regularly transacts business.

191. *Id.* at 410, 671 N.Y.S.2d at 904, citing *Wilson v. Lufthansa* 108 A.D.2d 393, 397, 489 N.Y.S.2d 575.

192. *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998).

193. *Id.* at 19.

194. The *Minpeco* factors are: (i) the competing interests of the nations whose laws are in conflict; (ii) the hardship that compliance would impose on the party or witness from whom discovery is sought; (iii) the importance to the litigation of the information and documents requested; and (iv) the good faith of the party resisting discovery. *Id.* at 22, citing *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

195. *See First Am. Corp.*, 154 F.3d at 22.

196. *Id.* at 23.

197. *First Am. Corp. v. Price Waterhouse LLP*, 1998 WL 474196 (S.D.N.Y. Aug. 13, 1998).

198. *See id.* at *6.

In *Triple Crown America, Inc. v. Biosynth AG*,¹⁹⁹ a Pennsylvania federal court considered whether Biosynth AG, a foreign corporation with its principal place of business in Staad, Switzerland, could be ordered to appear for depositions in that district. The court noted that Swiss law places substantial restrictions on the conduct of discovery.²⁰⁰ Biosynth AG argued for reliance on the Hague Convention, and that Swiss authorities may allow depositions in Switzerland for use in a U.S. lawsuit, but provided no details as to the procedures or how long they might take. The court stated that "[t]he burden of demonstrating that use of the Convention procedures would provide effective discovery is on the proponent of using such procedures."²⁰¹ The court concluded that depositions in Switzerland would "entail substantial time, effort, expense and delay, and would not effectively facilitate the gathering of evidence in a manner contemplated by the Federal Rules."²⁰² Consequently, plaintiff could depose Biosynth AG in the Eastern District of Pennsylvania, although plaintiff would be required to reimburse defendant for reasonable travel and lodging costs and the depositions were to be scheduled to minimize disruption to the operation of Biosynth AG.²⁰³

*Ex Parte Toyokuni & Co., Ltd.*²⁰⁴ concerned a suit against a kerosene heater manufacturer over a death allegedly caused by a faulty heater. The administrator of the estate of the deceased sought to depose representatives of defendant Toyokuni, a Japanese corporation that had no offices in Alabama or the United States. The Alabama Supreme Court found that since the plaintiff had made an attempt to suggest a mutually convenient mid-point for the depositions, such as Los Angeles, but Toyokuni rejected the suggestion, the circuit court had not abused its discretion in ordering the depositions to take place in Alabama, as opposed to Toyokuni's offices in Japan, as it was "[f]aced with Toyokuni's lack of cooperation."²⁰⁵

The Alabama Supreme Court did not view Japan as a viable venue for the depositions due to its strict discovery procedures, especially since "Toyokuni would have access to our more open discovery methods."²⁰⁶ Moreover, the court perceived a U.S. interest in having the depositions in Alabama to resolve any discovery conflicts and "in maintaining the integrity of our judicial system and in exercising the jurisdiction of this state and this nation over persons whose products are distributed in the United States and in Alabama."²⁰⁷

VII. Personal Jurisdiction

SHELBY R. QUAST*

The U.S. courts continued to refine the legal principles governing when they may properly exercise personal jurisdiction over cases involving foreign parties and events. Notable developments in 1998 focused on jurisdiction over intentional torts by foreign parties and applicable burden of proof.

199. *Triple Crown Am., Inc. v. Biosynth AG*, 1998 WL 227886 (E.D. Pa. Apr. 30, 1998).

200. *See id.* at *3.

201. *See id.* (citations omitted).

202. *See id.* at *4.

203. *See id.*

204. *Ex Parte Toyokuni & Co., Ltd.*, 715 So.2d 786 (Ala. S. Ct. 1998).

205. *See id.* at 789.

206. *See id.*

207. *See id.* at 789-90.

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A. FOREIGN STATES ARE NOT "PERSONS" FOR PURPOSE OF DUE PROCESS ANALYSIS

In *Flatow v. Iran*,²⁰⁸ the estate of a U.S. student killed in a suicide bombing attack in Israel brought a wrongful death action against Iran and its officials under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA). The district court held that a foreign state is not a person for purposes of the due process clause and therefore could not claim a lack of personal jurisdiction.²⁰⁹ The court reasoned that states of the United States and the federal government do not have a liberty interest protected by the Due Process Clause and are not considered persons for purposes of personal jurisdiction concepts. It concluded that a foreign state is comparable to a U.S. state or the federal government. The court went on to find that a foreign state sued for sponsoring terrorist activities rather than engaging in commercial activities will invariably have sufficient contacts with the United States to satisfy due process and found general jurisdiction because of the constant interaction between the United States and foreign officials through diplomatic and international relations. The court also found fair play and substantial justice to be well served by the exercise of jurisdiction over foreign states that sponsor terrorism.

B. FOREIGN PARENT COMPANIES ARE SUBJECT TO PERSONAL JURISDICTION BASED ON SALES TO A U.S. SUBSIDIARY

In *Tomra of North America v. Environmental Products Corp.*,²¹⁰ a trade dress infringement action, the defendant counterclaimed against the plaintiff and its foreign parent corporation. The foreign parent moved to dismiss the counterclaim, asserting a lack of personal jurisdiction. The defendant contended that jurisdiction was proper because the foreign parent was (i) the owner of the trade dress at issue, (ii) the plaintiff/subsidiary was a domestic corporation related to the parent with its principal place of business in Connecticut and held itself out as licensed to use the intellectual property rights of the parent throughout the United States, and (iii) the parent had manufactured all the relevant machines, which the plaintiff/subsidiary exclusively marketed, sold, and distributed throughout North America. The court first held the foreign parent to be subject to jurisdiction under a Connecticut statute authorizing jurisdiction by a Connecticut resident against a foreign corporation on a claim arising from the manufacture, production, or distribution of goods when the foreign corporation had a reasonable expectation that the goods would be used in the state. The court next decided that the exercise of personal jurisdiction comported with the Due Process Clause. Citing the Supreme Court's decisions in *World-Wide Volkswagen* and *Asahi*, the court held that the foreign parent, as the largest manufacturer of the relevant machines sold in the United States, all of which were sold through its Connecticut subsidiary, reasonably should have anticipated that its products would reach Connecticut on a regular basis. Finally, exercising jurisdiction was reasonable because the machines were distributed in Connecticut, the foreign parent's subsidiary and the defendant had places of business there, and many of the witnesses and documents were there.

C. CIRCUITS REFINE THE "REASONABLENESS" COMPONENT OF DUE PROCESS

*OMI Holdings, Inc. v. Royal Insurance Co.*²¹¹ was an insurance coverage dispute between OMI and two foreign insurers. The insurers moved to dismiss for lack of personal jurisdiction

208. *Flatow v. Iran*, 999 F. Supp. 1 (D.D.C. 1998).

209. The FSIA itself provides that, where subject-matter jurisdiction under the FSIA exists, "[p]ersonal jurisdiction over a foreign state shall exist." 28 U.S.C. § 1330(b) (1998).

210. *Tomra of N. Am. v. Environmental Prods. Corp.*, 4 F. Supp.2d 90 (D. Conn. 1998).

211. *OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086 (10th Cir. 1998).

on the ground that they did not have sufficient contacts with Kansas. The court began by adopting the First Circuit's sliding scale approach to the interplay of the minimum contacts and reasonableness elements of the due process analysis: depending on the strength of the minimum contacts showing, a greater or lesser showing on the reasonableness factors needs to be made.

One of the main issues in the case was whether a clause in an insurance policy stating that the insurer would defend certain claims against the insured in any U.S. court establishes minimum contacts with all the courts covered by the clause. The court observed that this issue had been the subject of conflicting decisions in other circuits. After reviewing the other decisions, the court decided that such "territory of coverage clauses" creates a contact with the forum state that is "quantitatively low on the due process scale" but that satisfies the minimum contacts requirements.

The court then determined that exercising jurisdiction would be unreasonable. It found the burdens on the insurers of litigating in Kansas to be significant because they were Canadian companies that issued a policy to another Canadian company and had no offices or agents in Kansas. The interests of Kansas were slight because the plaintiff, the insurers, and the dispute had little to do with Kansas, and the parties could obtain convenient relief in another forum.

The Sixth Circuit held that Canadian defendants are less burdened by defending suits in the United States than other foreign defendants. In *Aristech Chemical Ltd. v. Acrylic Fabricators Ltd.*,²¹² the defendant, an Ontario, Canada company with its primary place of business there, had purchased acrylic from the plaintiff in Kentucky and then failed to pay. The plaintiff sued in Kentucky. The Canadian defendant moved to dismiss for lack of personal jurisdiction, but conceded that it had availed itself of the privilege of acting in Kentucky and that the cause of action was Kentucky-based. The court found that exercising jurisdiction over the defendant would be reasonable. The court held that a Canadian defendant bears a substantially lighter burden than most other foreign defendants in defending suit in the United States because both the U.S. and the Canadian judicial systems are rooted in the same common law traditions and because of the proximity of Canada to the United States. The court also found the case not to implicate the procedural and substantive policies of Canada so as to counsel against the exercise of personal jurisdiction.

D. APPLICATION OF *Calder v. Jones* to Transnational Cases

In *Calder*, a defamation case, the Supreme Court found personal jurisdiction to be proper over nonresident defendants where (i) an intentional tort was committed outside the forum, (ii) the forum was the focal point of the harm suffered by the plaintiff as a result of that tort, and (iii) the forum was the focal point of the tortious activity in the sense that the tort was "expressly aimed" at the forum.²¹³ When applying *Calder* outside the defamation context, the circuits have disagreed as to whether the case supports personal jurisdiction wherever the effects of an intentional tort are felt. The Fourth, Fifth, Eighth, Ninth, and Tenth Circuits view *Calder* as requiring more than a mere allegation that the plaintiff feels the effect of the defendant's tortious conduct in the forum.²¹⁴ The Seventh Circuit, by

212. *Aristech Chem. Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624 (6th Cir. 1998).

213. *Calder v. Jones*, 465 U.S. 783 (1984).

214. See, e.g., *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995) (*Calder* does not set forth a per se rule that an allegation of an intentional business tort alone is sufficient to confer personal jurisdiction in the forum where the plaintiff resides); *Southmark Corp. v. Life Investors Inc.*, 851 F.2d 762 (5th Cir. 1988) (*Calder* does not support jurisdiction where there was no evidence that defendant expressly aimed its allegedly

contrast, interpreted *Calder* as holding that jurisdiction may properly be exercised in the state where the injury occurred.²¹⁵

In *Imo Industries v. Kiekert*,²¹⁶ the Third Circuit applied *Calder* for the first time to a business tort. In this case, Imo, a multinational corporation based in New Jersey, sued a German corporation for tortiously interfering with its attempt to sell its wholly-owned Italian subsidiary to a French corporation. The court declined to follow the Seventh Circuit, finding its interpretation of *Calder* too broad, and opted instead to follow the majority's more conservative reading of *Calder*. The court articulated its own three-prong test that a plaintiff must meet for *Calder* to apply: (1) the defendant must have committed an intentional tort; (2) the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.²¹⁷ Applying this three-prong test to the facts of this case, the court reasoned that personal jurisdiction did not exist because Imo did not show that the German defendant "expressly aimed" its tortious conduct at New Jersey.

The First Circuit also addressed *Calder* in *Noonan v. Winston Co.*,²¹⁸ a defamation case based on the unauthorized use of a Massachusetts resident's photograph in a cigarette advertising campaign in France. The court applied a narrow reading of *Calder*, finding that jurisdiction may be properly exercised only when the defendant aimed an act at the forum state, knew the act would likely have a devastating effect, and knew the injury would be felt in the forum state. Because the offending advertisement was aimed solely at French consumers and the defendant was not aware that copies of the magazine bearing the advertisement would end up in Massachusetts, the court found the plaintiff's showing to be insufficient. The advertisement appeared in 305 magazines distributed in the forum—not enough to merit a finding that Massachusetts was the focal point of the action or that the defendant aimed the advertisement toward Massachusetts. The court concluded that a forum-based injury was not enough to support jurisdiction: "[t]o find otherwise would inappropriately credit random, isolated, or fortuitous contacts and negate the reason for the purposeful availment requirement" adopted in *Calder*.²¹⁹

E. PLAINTIFF BEARS BURDEN UNDER RULE 4(k)(2)

In *United States v. Offshore Marine Ltd.*, the District Court of the Virgin Islands addressed the question of which party bears the burden of proving the defendant is not subject to jurisdiction

tortious activities at Texas, or that Texas was the focal point of the tortious conduct); *ESAB Group, Inc. v. Centruvit, Inc.*, 126 F.3d 617 (4th Cir. 1997) (mere knowledge that plaintiff feels impact of tort in his home state is not enough to satisfy *Calder*); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (1st Cir. 1998) (even where effects occurred in forum, *Calder* does not support jurisdiction where focal point of "alleged wrongdoing" occurred outside forum); *Cybersell Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (rejecting jurisdiction under *Calder* finding that defendant's website was not aimed intentionally at Arizona knowing that harm was likely to be caused there).

215. See *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997) (the state where the victim of a tort suffers injury may entertain a suit against the alleged tortfeasor).

216. *Imo Indus. v. Kiekert*, 155 F.3d 254 (3d Cir. 1998).

217. See *id.* at 256.

218. *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998).

219. See *id.* at 91.

in any state under Federal Rule of Civil Procedure 4(k)(2).²²⁰ Rule 4(k)(2) authorizes the exercise of personal jurisdiction by federal courts in a federal question case based on contacts with the nation as a whole, rather than contacts limited to the state of the forum. In a case of first impression in the Third Circuit, the court held that the plaintiff bears the burden of establishing personal jurisdiction by proving that the defendant is not otherwise subject to service of process in any state. In this case, the United States brought suit against the defendant, a Netherlands corporation, charging negligence under the general maritime law that caused or contributed to the sinking of an oil laden barge. Because the United States did not provide information establishing that the defendant was not subject to personal jurisdiction in any state, the court granted the defendant's motion to dismiss for want of personal jurisdiction.

VIII. Service of Process Abroad

PATRICK P. GUNN*

This past year yielded several significant decisions on service of process abroad. Most notably, the Fourth Circuit and the United States Court of International Trade both provided needed guidance as to the proper construction of Hague Convention²²¹ provisions allowing for service abroad by "officials" and "competent persons." In addition, the Utah Supreme Court held that the Inter-American Convention on Letters Rogatory²²² is not the exclusive means of service between residents of signatory nations.

A. SERVICE UNDER FEDERAL RULE OF CIVIL PROCEDURE 4(F)

In *Mayoral-Amy v. BHI Corp.*,²²³ a Florida district court addressed whether to require a pro se Florida plaintiff to effect service in a manner consistent with the law of Belize, or whether to craft—without regard to the law of Belize—its own method of service under Federal Rule of Civil Procedure 4(f)(3). Plaintiff brought a breach of contract suit against a corporation and citizens of Belize. After defendants failed to respond to plaintiff's written request that they waive service requirements, plaintiff faxed them copies of his complaint. Defendants responded with a motion to dismiss, arguing that the law of Belize did not permit service by facsimile, but required service by a Belizean attorney or by request to the Supreme Court of Belize.

In testing the sufficiency of service, the court first declined to apply the Hague Convention, finding that Belize's status as a signatory was "uncertain." Although Belize's predecessor, British Honduras, was a party to the Hague Convention as a territory of the United Kingdom, "[s]ince achieving independence, Belize has not become a signatory."²²⁴ As a result, the court determined that service could properly be effected only under Federal Rule of Civil Procedure 4(f)(2), "governing circumstances where there is no internationally agreed means of service," or alterna-

220. The text of Fed. R. Civ. P. 4(k)(2) reads:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

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221. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

222. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 98-27, 14 I.L.M. 339 (1984) [hereinafter Inter-American Convention].

223. *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456 (S.D. Fla. 1998).

224. See *id.* at 459 n.2.

tively, under Rule 4(f)(3), which, it found, "allows this Court to authorize any particular method of service of its own choosing, so long as the order does not contradict any applicable international agreement."²²⁵

With some reluctance, the court declined to exercise the authority granted to it by Rule 4(f)(3), acknowledging that the provision empowered it to "define a method of service by which the parties in Belize may be acceptably contacted, regardless of whether or not such method contravenes Belize's law."²²⁶ Looking to the law of Belize, the court concluded that plaintiff's fax service was defective, denied defendant's motion to dismiss without prejudice, and directed plaintiff to properly effectuate service within sixty days.²²⁷

B. SERVICE ON CORPORATIONS BY SERVICE ON SUBSIDIARIES UNDER STATE LAW

In *Sankaran v. Club Méditerranée, S.A.*,²²⁸ a New York district court determined that, where foreign corporate defendants were doing business in New York exclusively through their U.S. subsidiaries, service on those subsidiaries was sufficient to constitute service on the foreign parents. In *Sankaran*, plaintiff brought tort claims against several foreign corporations and their wholly-owned U.S. subsidiaries, Club Med Management Services (CMMS), and Club Med Sales (CMS). Plaintiff purported to serve the foreign parents through service on their U.S. subsidiaries. While noting that the mere existence of a parent-subsidiary relationship was not in itself sufficient to enable plaintiff to effect service in this manner, the court nevertheless determined that other facts before it supported the conclusion that plaintiff had properly served the foreign parents.²²⁹ The court found that "plaintiff has alleged facts sufficient to show that the non-domiciliary defendants are doing business in New York through CMS and CMMS, and that these organizations are doing all the business the non-residents would do were they here by their own officials." The court concluded that plaintiff had "made a sufficient showing of an agency relationship between the nonresident defendants and CMS and CMMS to indicate that service of process upon CMS and CMMS was adequate to give notice to the other defendants."²³⁰

C. DEVELOPMENTS UNDER THE HAGUE CONVENTION

1. Service by Mail under Article 10(a)

A Vermont district court decided, in *Taft v. Moreau*,²³¹ that judicial documents served on residents of Quebec under article 10(a) of the Hague Convention need not be translated into French. Though Canada's Instrument of Accession requires that judicial documents served on residents of Quebec by Canada's Central Authority be translated into French, the court held that this requirement only applied to judicial documents served pursuant to article 5, which, "by its terms pertains only to service by the Central Authority or its designated agency, and imposes no requirements on service under Article 10."²³² The court did, however, go on to note that "[s]ervice of process must also satisfy Rule 4 of the Federal Rules of Civil Procedure

225. See *id.* at 459.

226. See *id.* at 458 n.3.

227. See *id.* at 460.

228. *Sankaran v. Club Méditerranée, S.A.*, No. 97 Civ. 8318 (RPP), 1998 WL 433780 (S.D.N.Y. July 31, 1998).

229. See *id.* at *5.

230. See *id.*

231. *Taft v. Moreau*, 177 F.R.D. 201 (D. Vermont 1997).

232. See *id.* at 204 (citing *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 464 (E.D.N.Y. 1986)).

and constitutional due process," and cautioned that "in some instances a failure to provide a translation of the document in a language the recipient could understand might be constitutionally unreasonable."²³³ The court found no such due process concern in its case, however, since neither of the Quebec defendants claimed lack of notice or an inability to understand the language of the complaint.²³⁴

2. Service under Articles 10(b) and 10(c)

Articles 10(b) and 10(c) of the Hague Convention permit sending of requests for service of process abroad directly to the "judicial officers, officials, or other competent persons" of the receiving state, provided the receiving state does not object.²³⁵ In *Koebler v. Dodwell*,²³⁶ the Fourth Circuit considered the meaning of "competent persons" under article 10(c), and held that this term should not be narrowly construed to mean only employees of the destination state, but should also include private process servers authorized to effect service under the law of the destination state.

In *Koebler*, defendant Dodwell, a Bermuda resident, had succeeded in vacating a lower court default judgment entered against him for lack of personal and subject matter jurisdiction. Plaintiff had served Dodwell by forwarding papers directly from plaintiff's U.S. attorney to a private process server in Bermuda, who in turn served them on Dodwell. On appeal, plaintiff contended that he had effectively served Dodwell under article 10(c).

Dodwell did not dispute that plaintiff's attorney was a "person interested in [the] judicial proceeding" entitled to initiate service under article 10(c), or that the process server hired by plaintiff's attorney was competent to effect service in Bermuda. Instead, Dodwell argued, *inter alia*, that "competent persons of the State of destination," read in the context of article 10(c)'s language "judicial officers, officials or other competent persons of the State of destination," must refer only to competent persons who are employed by the destination state. The Fourth Circuit, perhaps somewhat unfairly,²³⁷ rejected this construction as a "tortured reading" of the language of article 10(c). The court reasoned that such a restrictive interpretation "simply does not fit within the context of the liberal service options provided for in the treaty, which include service by mail."²³⁸ Finding service was effective, and finding Dodwell's other arguments similarly unpersuasive, the court reversed the lower court's decision vacating the judgment.²³⁹

In *United States v. Islip*,²⁴⁰ the United States Court of International Trade provided some guidance as to what types of "officials" and "competent persons" are authorized to effect

233. See *id.*

234. See *id.*

235. See Hague Convention, *supra* note 221, art. 10(b) ("Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, . . ."); art. 10(c) ("Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination").

236. *Koebler v. Dodwell*, 152 F.3d 304 (4th Cir. 1998).

237. See, e.g., GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 811 (1989) (noting uncertainty as to the identity of "competent persons" who can be requested to effect service under article 10(c) of the Hague Convention).

238. See *Koebler*, 152 F.3d at 307.

239. See *id.*

240. *United States v. Islip*, 18 F. Supp. 2d 1047 (Ct. Int'l Trade 1998).

service under articles 10(b) and 10(c). In *Islip*, the United States government sued a Canadian exporter's employee Brown and others to recover civil penalties, alleging false placement of country-of-origin markings on goods exported from Canada to the United States. The head of the United States Customs Office of Investigations transmitted the summons and complaint to the Acting Manager of the regional Canadian Customs Investigations Service along with a request that the documents be served on defendant Brown. Brown eventually brought motions to quash service and to dismiss, alleging, inter alia, that service had not properly been effected under article 5 of the Hague Convention.

The court denied the motion to dismiss on the ground that Brown had waived his challenge to service by not asserting it in his first responsive pleading.²⁴¹ It nevertheless went on to reject defendant's arguments on the merits. The court observed that although service was not effected under article 5 of the Hague Convention, service might nevertheless still be proper under articles 10(b) and 10(c). The court cited "uncertainty" surrounding the identity of "competent persons" who can transmit, receive, and serve process papers under articles 10(b) and 10(c), and found little guidance from commentators on the negotiating history of the Hague Convention. Finally, the court looked to Canadian Instrument of Accession, which it believed supported an "expansive interpretation of who is 'competent' to transmit, receive and serve process in Canada under Articles 10(b) and 10(c)."²⁴² The court also looked to Canadian internal laws and the laws of Ontario, which were "flexible" and did "not proscribe government officials or even private persons from effecting service of process."²⁴³

Guided by these principles, the court went on to analyze the facts at bar. With respect to article 10(b), the court found that the summons and complaint had been transmitted for service by a United States customs investigator, who was indisputably a United States "official." These documents were then transmitted to the "Acting Manager" of a regional Canada customs investigations office and then to a further Canadian customs "official" for service. "Thus, service of Defendant was 'directly effected' by and through officials and 'competent persons,' pursuant to Article 10(b)."²⁴⁴

As for 10(c), the court first noted that there was "no case authority that sheds light on who qualifies as a 'person interested in a judicial proceeding.'"²⁴⁵ The court nevertheless accepted the government's argument that the United States customs official who had transmitted the summons and complaint was sufficiently "interested," inasmuch as his office was in charge of investigating the alleged fraud underlying the action.²⁴⁶

3. *Additional Signatories to Hague Service Convention*

There were no new signatories to the Hague Convention in 1998.

D. ALTERNATIVES TO SERVICE UNDER THE INTER-AMERICAN CONVENTION

The Utah Supreme Court held in *Skanchy v. Calcados Ortope S.A.*²⁴⁷ that the Inter-American Convention does not provide the exclusive means of service between residents of signatory

241. See *id.* at 1053.

242. See *id.* at 1056.

243. See *id.* at 1057.

244. See *id.*

245. See *id.*

246. See *id.*

247. *Skanchy v. Calcados Ortope S.A.*, 952 P.2d 1071 (Utah 1998).

nations. In *Skandby*, U.S.-based shoe distributors sued their Brazilian manufacturer Calcados on promissory estoppel and breach of contract claims. Plaintiffs retained a Brazilian attorney to serve the complaint and summons upon Calcados in Brazil. Calcados failed to respond to the complaint and judgment was eventually entered in favor of plaintiffs on the promissory estoppel claim. Calcados appealed on several grounds, including invalidity of service of process, arguing that plaintiffs' service failed to comply with the Hague Convention and the Inter-American Convention.

The court rejected Calcados' argument based on the Hague Convention, observing that Brazil was not a signatory, and finding that "the Convention cannot apply to any service or process within a non-signatory nation."²⁴⁸ The court also rejected Calcados' argument based upon the Inter-American Convention. Citing the Fifth Circuit's decision in *Kreimerman v. Casa Veerkamp S.A. de C.V.*,²⁴⁹ the court held that letters rogatory, or letters of request, are "merely one of many procedural mechanisms by which a court in one country may request authorities in another country to assist the initiating court in its administration of justice."²⁵⁰ Accordingly, the Inter-American Convention did not preempt service of process effected under Utah rules, which allow service of process on foreign corporations to be made by "by delivering [process] to an officer or a managing general agent."²⁵¹

IX. Enforcement of Foreign Judgments

DAVID M. ROSENZWEIG*

During 1998, the Hague Conference on Private International Law continued its planning and drafting efforts toward the creation of a Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters. With meetings of the special commission charged with drafting the convention scheduled for November 1998 and June 1999, current plans are geared toward an October 2000 adoption of a final text for signature and ratification.²⁵²

Despite this progress toward a multinational convention on enforcement of judgments, significant obstacles may make it difficult to agree upon a text that will be acceptable to a substantial number of nations. Differences among national laws and policies on such issues as acceptable bases for the exercise of personal jurisdiction and the propriety of punitive, multiple, and other substantial damages awards will have to be resolved.²⁵³

Until such time as the United States signs and ratifies a multilateral convention, the recognition and enforcement of foreign judgments in the United States will continue to be governed by federal and state statutes and case law. In the absence of federal legislative activity in 1998, questions of enforcement continue to rest largely upon the principles of international comity articulated in the Supreme Court's 1895 decision in *Hilton v. Guyot*.²⁵⁴ As of year's end,

248. *Id.* at 1075.

249. *Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634 (5th Cir. 1994).

250. *Skandby*, 952 P.2d at 1075.

251. *Id.*

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252. See Lawrence W. Newman & Michael Burrows, *Proposed Hague Convention on Judgments*, N.Y.L.J., Dec. 30, 1998, at 3 (citing letter dated Sept. 1998, from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, to the Secretary of State's Advisory Committee on Private International Law).

253. See generally Symposium: *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOK. J. INT'L L. 1 (1998).

254. *Hilton v. Guyot*, 159 U.S. 113 (1895).

twenty-nine jurisdictions had adopted some form of the Uniform Foreign Money Judgments Recognition Act, which codifies the comity-based enforcement analysis.²⁵⁵ A small number of 1998 decisions highlighted some of the potential obstacles to effective enforcement of foreign judgments.

A. PUBLIC POLICY BARS RECOGNITION OF BRITISH LIBEL JUDGMENT

The District of Columbia Circuit, with the assistance of the Maryland Court of Appeals, addressed whether a British libel judgment should be denied enforcement under the Maryland Uniform Foreign Money Judgments Recognition Act on the ground that the "cause of action on which the judgment is based is repugnant to the public policy of the State."²⁵⁶ Answering a question certified to it by the federal court, the Maryland Court of Appeals concluded in *Telnikoff v. Matusevitch* that differences between English and American libel laws rendered enforcement of the British award contrary to Maryland public policy.²⁵⁷

In an extensive opinion that analyzed the origins and fundamental principles of United States, Maryland, and English defamation laws, the Maryland court determined that the plaintiff's British judgment was based upon standards that failed to conform to several key aspects of First Amendment and Maryland state precedent regarding defamation actions arising out of speech published in newspapers. Among the several aspects of English defamation law that the court found to be incompatible with United States and Maryland defamation principles were: the lack of any requirement under English law that a defamation plaintiff prove fault on the part of the defendant, whether simple negligence for a private figure plaintiff or the *New York Times v. Sullivan*²⁵⁸ actual malice standard required by the First Amendment in cases involving matters of public concern or public figure or official plaintiffs; the presumption under English law that an allegedly defamatory statement is false—and the threat of punitive damages if the defendant unsuccessfully raises the affirmative defense of truth; and the prohibition imposed by the House of Lords in this case upon considering the allegedly defamatory statements in the broader context of the *Daily Telegraph* article and ensuing exchange of letters.²⁵⁹ The court noted, finally, that its conclusion that recognition of the English law defamation judgment was contrary to Maryland public policy was bolstered by the prospect that a contrary result might lead to forum shopping by defamation plaintiffs, given the comparatively pro-plaintiff bias of English defamation law and the increasing prevalence of large damage awards in England.²⁶⁰ Upon receipt of the answer to its certified question, the D.C. Circuit affirmed a district court judgment denying enforcement of the British judgment.²⁶¹

B. FULL FAITH AND CREDIT NOT EXTENDED TO SISTER STATE JUDGMENT ENFORCING FOREIGN JUDGMENT

A Texas state court denied an attempt by the holder of a Canadian judgment to circumvent the comity analysis ordinarily attendant upon obtaining recognition of a foreign country judgment by obtaining a Louisiana state court judgment enforcing the Canadian judgment and then attempting

255. Unif. Foreign Money Judgments Recognition Act, 13 U.L.A. 149, 261.

256. MD. CODE ANN. § 10-704(b)(2) (Michie 1974 & Supp. 1995).

257. *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

258. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

259. *Telnikoff*, 702 A.2d at 247-49.

260. See *id.* at 702 A.2d at 250-51.

261. See *Telnikoff v. Matusevitch*, 159 F.3d 636 (D.C. Cir. 1998).

to enforce the Louisiana judgment in Texas under the less restrictive standards applicable to the recognition of sister state judgments. In *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*,²⁶² Reading & Bates obtained a substantial patent infringement judgment against Baker Energy. In an attempt to collect the Canadian judgment in the United States, Reading & Bates first obtained a judgment in Louisiana recognizing the Canadian judgment, but was apparently unable to execute upon the judgment in that state. Accordingly, Reading & Bates commenced an action in Texas, seeking orders enforcing both the Canadian judgment, on a direct basis, and the Louisiana judgment that had previously recognized the Canadian judgment.

The court of appeal reversed a lower court decision denying direct recognition of the Canadian judgment under the Texas Uniform Foreign Country Money Judgment Recognition Act.²⁶³ The court affirmed, however, the ruling below that Reading & Bates could not rely upon the Constitution's Full Faith and Credit Clause²⁶⁴ and the Uniform Enforcement of Foreign Judgments Act²⁶⁵ to obtain recognition of the Canadian judgment "through the back door" by submitting the Louisiana judgment for enforcement.²⁶⁶ The court recognized that the enforcement of sister state judgments ordinarily is virtually automatic, subject only to limited exceptions. Nonetheless, the court noted that there are considerably broader grounds for non-recognition of a foreign country judgment and concluded that interstate comity must give way when it would circumvent the right of a Texas court to exercise its discretion to consider Texas public policy and other elements of the international comity analysis involved in the recognition of a foreign country judgment.²⁶⁷

C. BANKRUPTCY COURTS NEED NOT GIVE PREFERENTIAL TREATMENT TO FOREIGN JUDGMENTS

In another case, a federal district court decision provided a reminder that convincing a United States court to recognize a foreign judgment does not always guarantee full satisfaction to the holder of the foreign judgment. To the contrary, the District Court for the District of Maryland, although purporting to give effect to two Dutch judgments, confirmed in *In re Travelstead*²⁶⁸ that the United States Bankruptcy Code can deprive a litigant of much of the benefit that might otherwise flow from the recognition of a foreign judgment. Under a Chapter 11 plan of reorganization, the Dutch judgments were treated as Class 6 unsecured claims against the debtor, raising the possibility that the foreign judgment creditor would receive at best a fraction of the total amount to be awarded by the Dutch court. The plan also permitted the debtor up to two years in which to repay certain loans at issue in the Dutch proceedings, notwithstanding an order of the Dutch court requiring immediate repayment or foreclosure upon the collateral for the loans.

On appeal by the judgment creditor from the bankruptcy court's order confirming the plan, the district court recognized the Dutch judgments but nonetheless permitted their effectiveness

262. *Reading & Bates Constr. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702 (Tex. Ct. App. 1998, no writ).

263. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.003, 36.005(b)(3), (7) (Vernon 1997).

264. See U.S. CONST. ART. IV, § 1.

265. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.002 (Vernon 1997). The act, not to be confused with the Uniform Foreign Money Judgments Recognition Act, addresses the enforcement of judgments of domestic courts, not those of foreign countries.

266. *Reading & Bates*, 976 S.W.2d at 715.

267. See *id.* ("We will not permit a party to clothe a foreign country judgment in the garment of a sister state's judgment and thereby evade . . . our own recognition process.").

268. *In re Travelstead*, 227 B.R. 638 (D. Md. 1998).

to be impaired. The district court found that the foreign judgment creditor asserted pre-petition claims that would be discharged upon confirmation of the plan of reorganization.²⁶⁹

The judgment creditor contended that the plan violated principles of international comity by failing to give complete effect to the two Dutch judgments. She argued, first, that the plan's provision allowing the debtor two years to repay the loans contravened the terms of the first Dutch judgment, which called for immediate payment or the imposition of forfeiting penalties. Second, the judgment creditor contended that the classification of her right as an unsecured claim conflicted with the other Dutch judgment, which required payment according to a schedule established pursuant to Dutch law.²⁷⁰

The district court rejected these arguments, however, concluding that, even assuming the plan conflicted with the Dutch judgments, the bankruptcy court had not abused its discretion in declining to extend comity. Rather, the existence of conflicts with a foreign judgment "does not require a court to extend comity, but simply requires its consideration."²⁷¹ Moreover, although the bankruptcy court had not refrained from impairing the Dutch judgments in limited respects, the district court noted that "the Plan defers to the Dutch judgments far more than it conflicts with them, for it allows the validity of both . . . claims against the Debtor to be determined under Dutch law."²⁷²

Finally, the district court noted that it was immaterial whether the Dutch court would apply reciprocal recognition to the elements of the bankruptcy court's judgment that affected the Dutch judgments. Observing that "the bankruptcy court in confirming the Plan extended comity to the Dutch judgments in all respects but timing for their payment," the district court noted that "it would seem just and reasonable that the Dutch courts should to that extent extend their own comity to these bankruptcy proceedings."²⁷³ Not content to rely upon the good will of the Dutch court, however, the district court warned in conclusion that if the judgment creditor attempted to enforce the Dutch judgments in the Netherlands in a manner that contravened the plan approved by the bankruptcy court, a United States court, "having personal jurisdiction over her, has the power to remedy her extraterritorial violations of its orders."²⁷⁴

X. Act of State

KATHERINE BIRMINGHAM WILMORE*

For purposes of international comity and the domestic separation of powers regarding foreign affairs, the act of state doctrine limits U.S. courts' review of official acts by foreign states in their own territories. This doctrine has rarely been applied, and even less so after *W.S. Kirkpatrick & Co. v. Environmental Techtonics Corp.*²⁷⁵ strictly limited its use to cases where the court's decision requires determining the validity of a foreign sovereign act. In one notable development this year, a federal court in the District of Columbia refused to apply the doctrine to international terrorist acts by a foreign sovereign. In other cases, the Eleventh Circuit declined to create a

269. See *id.* at 644 (citing 11 U.S.C. § 1141(d)(1)(A) ("the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation")).

270. See *id.* at 656.

271. *Id.*

272. *Id.* at 657.

273. *Id.*

274. *Id.* at 657-58.

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275. *W.S. Kirkpatrick & Co. v. Environmental Techtonics Corp.*, 493 U.S. 400 (1990).

commercial exception to the act of state doctrine, and the Ninth Circuit applied the doctrine to bar a decision that would have aided victims of human rights violations but required finding invalid a clear sovereign act of Switzerland.

A. THE ACT OF STATE DOCTRINE AND VIOLATIONS OF INTERNATIONAL LAW

In the *Unocal* decision discussed in last year's survey, a California federal court held that the act of state doctrine did not preclude review of claims against Burma for torture and forced labor.²⁷⁶ Similarly, the courts and Congress have deemed the act of state doctrine inapplicable to actions taken by heads of state for their personal gain or for criminal purposes²⁷⁷ and to expropriation of personal property in violation of international law.²⁷⁸

In 1998, international terrorism was added to this growing list of foreign sovereign acts for which the act of state doctrine is no longer available as a defense. In *Flatow v. Islamic Republic of Iran*,²⁷⁹ the District Court for the District of Columbia held that the act of state doctrine did not bar review of claims against Iran, where plaintiff's daughter was killed in a suicide bombing by a terrorist group funded exclusively by Iran. Plaintiff's daughter, Alisa Michelle Flatow, died in 1995 from wounds inflicted by the terrorist bombing of an Israeli bus on which she was traveling. Plaintiff sued Iran, its Ministry of Information and Security, and several Iranian government officials, all of whom failed to appear. In a non-jury trial the court found that Iran sponsored the Shafaqi faction of the Palestine Islamic Jihad, which claimed responsibility for the bomb killing Ms. Flatow—a fact confirmed by Israeli intelligence.

Because Iran defaulted, the district court addressed all the defenses it considered relevant, including the act of state doctrine.²⁸⁰ It held the act of state doctrine inapplicable here, because the bombing took place outside of Iran, and because "bus bombings and other acts of international terrorism are not valid acts of state of the type which bar consideration of this case."²⁸¹ As the court acknowledged, for purposes of the act of state doctrine "valid" does not necessarily mean "legal" under U.S. or international law.²⁸² Nevertheless, comparing acts of international terrorism to political assassinations ordered by foreign states outside their territory, which have already been held invalid for purposes of the act of state doctrine, the court concluded that the act of state defense was not available to Iran in this case.²⁸³

B. NO COMMERCIAL EXCEPTION TO ACT OF STATE DOCTRINE

In *Honduras Aircraft Registry, Ltd. v. Government of Honduras*,²⁸⁴ the Eleventh Circuit remanded to the district court for reconsideration the act of state doctrine issue. The lower court

276. See *National Coalition Gov't v. Unocal, Inc.*, 176 F.R.D. 329, 357 (C.D. Cal. 1997).

277. See, e.g., *United States v. Noriega*, 746 F. Supp. 1506, 1522 (S.D. Fla. 1990), *aff'd* 117 F.3d 1206 (1997) (holding that the illegal acts of former dictator were not official acts unreviewable by U.S. courts); *Republic of Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc) (same); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (same). See also *Roxas v. Marcos*, No. 20606, 1998 WL 793451 at *41 (Hawaii Nov. 17, 1998), *reconsideration pending* (Dec. 7, 1998).

278. See 22 U.S.C. § 2370(e)(2) (1994).

279. *Flatow v. Iran*, 999 F. Supp. 1 (D.D.C. 1998).

280. See 28 U.S.C. § 1608(e) (1994) (default judgment against foreign state may be entered only if "claimant establishes his claim . . . by evidence satisfactory to the court").

281. *Flatow*, 999 F. Supp. at 24.

282. See *id.*

283. See *id.*

284. *Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 129 F.3d 543 (11th Cir. 1997), *reh'g denied* 131 F.3d 157 (11th Cir. 1997).

had held the act of state doctrine inapplicable under a "perceived commercial exception to the doctrine."²⁸⁵ However, as the Eleventh Circuit pointed out, "there is no commercial exception to the act of state doctrine."²⁸⁶

Honduran and Bahamian corporations sued the government of Honduras for breach of their contract to upgrade the Honduran civil aeronautics program. The district court found subject matter jurisdiction under the commercial exception to the Foreign Sovereign Immunities Act (FSIA),²⁸⁷ and found the act of state doctrine inapplicable using the same reasoning. Citing *Kirkpatrick*, the Eleventh Circuit recognized that some of the same factors must be evaluated for deciding FSIA and act of state issues.²⁸⁸ Nevertheless, it remanded so that the lower court might consider all the relevant factors rather than rely on an unrecognized exception to the act of state doctrine.

C. CLASSIC APPLICATION OF THE ACT OF STATE DOCTRINE

In *Credit Suisse v. United States District Court*,²⁸⁹ the Ninth Circuit held that the act of state doctrine precluded the relief sought by judgment creditors of Ferdinand Marcos, because such relief would require U.S. courts to declare invalid an official act of Switzerland.

A federal district court in Hawaii awarded nearly two billion dollars in damages to the plaintiffs in a class action suit against Ferdinand Marcos for violations of human rights.²⁹⁰ However, plaintiffs failed in their efforts to collect on this judgment through levies upon Marcos' accounts in Swiss banks, because after Marcos was deposed, Switzerland, independently and then at the request of the Republic of the Philippines, froze all of Marcos' assets.²⁹¹ The plaintiffs then sued the banks directly seeking (1) to enjoin transfer of any Marcos assets, except as ordered by the district court, and (2) a declaration that the district court's assignment of all Swiss assets to plaintiffs' counsel for the benefit of plaintiffs is valid and binding on the banks. A California federal court denied the banks' motion to dismiss, and the banks filed for mandamus relief.²⁹²

The Ninth Circuit issued a writ of mandamus ordering the dismissal of the case under the act of state doctrine. The court found that issuance of the injunctive or declaratory relief sought would require a U.S. court to declare invalid Switzerland's previous orders freezing Marcos' assets and "render nugatory" Switzerland's efforts to assist the Republic of the Philippines by protecting the Marcos assets.²⁹³ Under the *Kirkpatrick* test, the Ninth Circuit found the Swiss orders to be an "official act of a foreign sovereign, performed within its own territory," and thus, inquiry into the validity of those orders would violate the act of state doctrine.²⁹⁴

285. *Id.* at 550.

286. *Id.* See also *W.S. Kirkpatrick*, 493 U.S. at 404-05 (noting that Justice White had proposed a commercial exception for the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706 (1976)).

287. For recent developments in the area of the Foreign Sovereign Immunities Act, including more discussion of the *Flatow* case, please see *supra* Part II.

288. See *Honduras Aircraft*, 129 F.3d at 550.

289. *Credit Suisse v. United States Dist. Court*, 130 F.3d 1342 (9th Cir. 1997).

290. See *id.* at 1344.

291. See *id.*

292. See *id.* at 1345.

293. *Id.* at 1347 (internal quotation omitted).

294. *Id.* (internal quotation omitted).